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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 413

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GEORGIA RAIL ROAD & BANKING COMPANY,
*Appellant,*

*vs.*

DOWNING MUSGROVE, WHO IS STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA,
*Appellee*

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA TO THE SUPREME COURT OF THE UNITED STATES

---

## STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

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Now comes Georgia Rail Road & Banking Company, appellant in the above stated case, and presents this Separate Statement, particularly disclosing the basis upon which appellant contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of the State of Georgia.

1. The final judgment of the Supreme Court of the State of Georgia (referred to hereinafter as "the State Supreme Court"), which appellant desires the Supreme Court of the United States to review upon appeal and to reverse, has the effect of sustaining certain Georgia laws (hereinafter set forth) as valid in their application to appellant as against appellant's contention, timely and properly set up and asserted, that as applied to appellant they violate the contracts clause (Article I, Section 10, Paragraph 1) of the Constitution of the United States and do not exist so far as appellant is concerned. Hence, appellant contends that the Supreme Court of the United States has jurisdiction upon appeal to review said judgment of the State Supreme Court either (A) under Section 237 of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (43 Stat. 936), 28 U. S. C. 344a (as in effect at and prior to the passage of the Act of January 31, 1928, 28 U. S. C. 861a, 861b, Chapter 14, 45 Stat. 54, or the amendatory Act of April 26, 1928, 28 U. S. C. 861b, Chapter 440, 45 Stat. 466), and pursuant to the provisions of the said two Acts of the year 1928; or (B) under Title 28, United States Code, Section 1257(2), and pursuant to 28 U. S. C. 861b,—depending on whether the jurisdiction of the Supreme Court of the United States to review upon appeal said judgment of the State Supreme Court, which became final prior to September 1, 1948, the effective date of the revised Title 28 of the United States Code, is still given by the legislation referred to in (A) or is now given by that referred to in (B). The statutory provisions referred to in (A) and (B) are set forth in Appendix I hereof.

2. The laws of the State of Georgia which said judgment of the State Supreme Court has the effect of sustaining as valid as against appellant's objections that as applied to it they are repugnant to the contracts clause (Article I, Section

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10, Paragraph 1) of the Constitution of the United States, are:

(a) The Act of the General Assembly of Georgia, approved February 28, 1874, entitled "An Act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this Act." Said Act is printed in full in Georgia Laws 1874, pages 107 et seq., and a copy of same is hereto attached as Appendix II. Said Act, as amended in respects not here germane, has been codified as Sections 92-2602, 92-2603 and 92-2604 of the Code of Georgia of 1933 (the present official code of the State of Georgia). A copy of said code sections is hereto attached as Appendix III.

(b) Article I, Section III, Paragraph III of the Constitution of Georgia of 1945 which is: "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

3. Said judgment of the State Supreme Court became final on the 28th day of July, 1948, it having been made and entered in the above entitled suit by the State Supreme Court under date of the 11th day of June, 1948, but was not handed down or published or otherwise made known by the State Supreme Court until the 15th day of June, 1948, with the consequence that the State Supreme Court caused the Commencement of the period of ten days during which a motion to rehear may be filed under its rules to be postponed until the 15th day of June, 1948, and on the 23rd day of June, 1948, appellant filed a motion to rehear, and on the 13th day of July, 1948, appellant filed a supplemental motion to rehear. The State Supreme Court entertained and considered said motion to rehear and said supplemental motion to rehear, but overruled both on the 16th day of July, without further opinion. Thereafter, on the 21st day of

July, 1948, appellant filed a second motion to rehear pursuant to leave to it so to do given by the State Supreme Court, and the State Supreme Court entertained and considered said second motion to rehear, but overruled it on the 28th day of July, without further opinion.

Appellant's application for appeal is presented on this the 13th day of October, 1948, and is timely filed, irrespective of whether the time within which it may be lawfully filed commenced to run from the day on which the State Supreme Court overruled the first motion to rehear and the supplemental motion to rehear which was July 16, 1948, or from the day on which the State Supreme Court overruled the second motion to rehear which was July 28, 1948, and irrespective of whether the time within which application for appeal may be made with respect to said final judgment of the State Supreme Court which became final prior to September 1, 1948, the effective date of the revised Title 28 of the United States Code, is still governed by Section 8 (a), Act of February 13, 1925, ch. 229, 43 Stat. 936, 940 (28 U. S. C. A. 350), Comp. St. § 1228b, and is three months, or is now governed by Title 28, United States Code, Section 2101(c) and is ninety days.

4. Said judgment of the State Supreme Court reversed the judgment of the trial court (Superior Court of Fulton County, Georgia) which had overruled a demurrer interposed to appellant's complaint as amended. Said demurrer contained grounds of general demurrer and grounds of special demurrer. Ground 3 of the general demurrer asserted that the suit although nominally against the Revenue Commissioner of Georgia was in reality a suit against the State of Georgia as to which the State had not consented to be sued. The State Supreme Court held that the suit is in purpose and effect a suit against the State as to which the State has not consented to be sued and not maintainable,

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and by its said judgment of reversal ordered and directed as follows: "Direction is given that the judgment overruling the demurrer on all grounds whether general or special, be vacated, and that ground 3 of the general demurrer be sustained and the petition dismissed, without any ruling or judgment as to other grounds and without prejudice to either party or the State with respect thereto."

Stated briefly, but sufficiently to show that the Supreme Court of the United States has jurisdiction upon appeal, appellant's complaint as amended (referred to hereinafter as "the complaint") which was challenged by said demurrer containing said Ground 3 alleged the following: That appellant was incorporated as "The Georgia Railroad Company" by an Act of the General Assembly of Georgia, assented to December 21, 1833 (Ga. L. 1833, pages 256 et seq.); that appellant's name was changed from "The Georgia Railroad Company" to its present name of "Georgia Rail Road & Banking Company" by an Act of the General Assembly of Georgia, assented to December 18, 1835 (Ga. L. 1835, page 180); that Section 15 of appellant's charter (said Act of December 21, 1833) provides: "• • • The stock of the said Company and its Branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said Railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent per annum on the net proceeds of their investments"; that the Revenue Commissioner of Georgia had, in disregard of said charter tax limitation, commenced proceedings to enable him to assess, for *ad valorem* taxation for each of several specified back years, railroad lines of appellant (referred to in the complaint and hereinafter as "the Charter Tax Lines") to the same extent that he would have had the right to assess them had said charter tax limitation not existed; that said charter

tax limitation applied to the Charter Tax Lines and that they had already been taxed for each of said several back years to the full extent permitted by said charter tax limitation; that the said tax limitation contained in appellant's charter constituted a contract between appellant and the State of Georgia, and that the Commissioner, although attempting to proceed by virtue of one or the other or both of the Georgia laws set forth in numbered Paragraph 2 hereof, could not lawfully proceed by virtue of either, for the reason that both as applied to appellant's Charter Tax Lines are repugnant to the contracts clause (Article I, Section 10, Paragraph 1) of the Constitution of the United States and void, in view of appellant's charter tax limitation. (The complaint set up two judgments adjudicating that the Charter Tax Lines could not be taxed beyond what is permitted by the said charter tax limitation, and pleaded them as *res adjudicata,* one of said judgments having been rendered by a Georgia trial court and affirmed by the State Supreme Court (*The State of Georgia* v. *Georgia Railroad & Banking Company,* 54 Ga., 424) and the other having been rendered by a Circuit Court of the United States and affirmed by the Supreme Court of the United States in the case of *Wright, Comptroller-General of the State of Georgia* v. *Georgia Rail Road & Banking Company,* 216 U. S. 420.) The complaint sought a declaratory judgment adjudicating that appellant's Charter Tax Lines could not be taxed beyond what is permitted by said charter tax limitation and sought injunctions, temporary and permanent, and a restraining order to prevent assessment and taxation of the Charter Tax Lines beyond what is permitted by said charter tax provision. The complaint also prayed that the Court declare what remedy appellant should pursue in order to get an adjudication with respect to the taxability of its Charter Tax Lines, in the event the Court should deter-

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mine that it had pursued the wrong remedy. The complaint showed that the Georgia statutes as to remedy for judicial determination of *ad valorem* tax liability are confused and uncertain to the point that all of the remedies in such regard which once existed may now have been repealed by implication if not expressly—that certainly appellant could not take the risk of assuming the existence of one of these remedies in order to prevent the great harm that was about to be perpetrated upon it. (Paragraphs 22 and 23 of the complaint containing averments as to want of another remedy are set forth in Appendix IV hereto.)

The State Supreme Court said in its opinion the following:

> "We do not overlook the plaintiff's allegations to the effect that there are grave doubts and uncertainties as to what remedy it may pursue in contesting the effort of the defendant to assess its charter lines for ad valorem taxation. The petition referred to several statutes of this State relating to remedy, including injunction and affidavit of illegality, to wit: Ga. L., 1918, p. 232, Ga. L. Ex. Sess., 1937-38, p. 77; Ga. L. 1931, p. 200; Ga. L., 1943, p. 204, and prayed for a declaratory judgment as to remedy. The petition was not aided by such allegations and prayer with respect to remedies; for if, as we have held, the suit is in essence one against the State, no judgment should be rendered declaring what remedy or remedies would be available as against it, if any, as that would be a decision at least in part against the State, even though it has not consented to be sued, and is not even a party."

By adjudging that this suit against the State Revenue Commissioner, in which it is shown that there exists between appellant and the State of Georgia said charter contract as to taxability of appellant's Charter Tax Lines and that the Commissioner was undertaking to violate that contract, claiming to be acting under the Georgia statute and the pro-

vision of the State Constitution (which are both set forth in numbered Paragraph 2 hereof) which the complaint shows are void as applied to appellant by reason of repugnancy to the contracts provision (Article I, Section 10, Paragraph 1) of the Constitution of the United States in view of appellant's charter contract—by adjudging that such a suit as this is a suit against the State as to which the State has not consented to be sued and, therefore, cannot be maintained, when the complaint alleges and shows that appellant has no other remedy which can meet the test of adequacy, the State Supreme Court has in effect adjudicated that said Georgia statute and said provision of the State Constitution are valid as against appellant's claim that as applied to it they are void and do not exist for the reason that they violate the contracts provision of the Constitution of the United States in view of appellant's charter contract. And the Supreme Court of the United States has jurisdiction upon appeal. *General Oil Company* v. *Crain, Inspector of Coal Oil*, 209 U. S. 211; *People of State of New York* v. *Zimmerman*, 278 U. S. 63.

Had the State Supreme Court held that this suit would not lie, whether considered as one brought under the Georgia Declaratory Judgments Act (Ga. L. 1945, pages 137 *et seq.*) or as one seeking an injunction under general principles of equity, and had pointed out a remedy, then the decision would have been only that appellant had not presented its Federal questions by a remedy provided by the State, and such Federal questions could not be reached by the Supreme Court of the United States in this suit. *Copperweld Steel Co.* v. *Industrial Commission of Ohio*, 324 U. S. 780. But the State Supreme Court did not so hold. What it held was that this suit in which it was shown that appellant had no other remedy which could meet the test of adequacy was one against the State as to which the State had not con-

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sented to be sued and not maintainable, and by that erroneous holding gave effect to the validity of said Georgia laws (set forth in numbered Paragraph 2 hereof) against appellant's contention that as applied to it each and both are repugnant to the contracts clause (Article I, Section 10, Paragraph 1) of the Constitution of the United States and void in view of appellant's charter contract, with the result that the Supreme Court of the United States under the holding of *General Oil Co. v. Crain, supra,* has jurisdiction to review said final judgment upon appeal.

5. Representative of the many cases holding that such a suit as this is not a suit against the State is *Poindexter* v. *Greenhow, Treasurer,* 114 U. S. 270 (see statement top of page 296); and *Belknap* v. *Schild,* 161 U. S. 10. See *The Pullman Company* v. *Knott, as Comptroller of the State of Florida,* 243 U. S. 447.

6. The Georgia statute referred to in (a) of numbered Paragraph 2 hereof has already been held by the Supreme Court of the United States to be violative of the contracts clause (Article I, Section 10, Paragraph 1) of the Constitution of the United States and void as applied to appellant in view of its charter contract (*Wright, Comptroller-General of the State of Georgia* v. *Georgia Railroad & Banking Company,* 216 U. S. 420) and void for the same reason as applied to appellant's lessees (*Wright, Comptroller-General of the State of Georgia* v. *Louisville & Nashville R. R. Co., et al.,* 236 U. S. 687); and, as regards the provision of the State Constitution referred to in (b) of numbered Paragraph 2 hereof, the Supreme Court of the United States has held that a provision of the State Constitution, adopted subsequently to the passage of an act of the General Assembly of Georgia which chartered a railroad company and contained a tax limitation provision such as that contained in appellant's charter, can no more abrogate such charter

tax provision than can a statute passed by the Legislature. *Central of Georgia Ry. Co.* v. *Wright, Comptroller-General of the State of Georgia,* 248 U. S. 525.

7. Appellant considers itself under compulsion to seek review by the Supreme Court of the United States on appeal of said final judgment for the following reason: If appellant elected not to seek such review and suffered this suit to be dismissed pursuant to the direction to dismiss it contained in said final judgment of the State Supreme Court, appellant would quite naturally seek redress and protection of its rights under the Constitution of the United States, protection of which it seeks in this suit, by pursuing one of the three statutory remedies referred to in the complaint and shown therein to be uncertain even to the point of non-existence, and should the State Supreme Court hold that appellant had pursued a remedy which had been repealed or did not apply to its situation, appellant would try another of such remedies and if the State Supreme Court were to hold that that one no longer existed or did not apply to its situation, appellant would try the third, and if the State Supreme Court held that the third no longer existed or was inapplicable to its situation, appellant would be remitted to a suit in equity against the Revenue Commissioner of the State of Georgia as a wrongdoer to prevent him from taxing appellant beyond what is permitted by its charter contract. And there is danger that upon appellant's bringing such a suit in equity it would be met with a plea setting up as *res judicata* the judgment of the trial court dismissing this suit as one against the State entered pursuant to said final judgment of the State Supreme Court in this case, which would be urged on the contention that such a suit in equity was comprehended in, if not identical with, this suit and just as much a suit against the State as this suit which would have been held

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to be a suit against the State by the State Supreme Court by a judgment from which there had been no appeal to the Supreme of the United States, although such an appeal could have been taken by virtue of the holding in *General Oil Company* v. *Crain, Inspector of Coal Oil, supra,* 209 U. S. 211. Then if such a plea of *res judicata* were sustained by the State Supreme Court and appellant appealed to the Supreme Court of the United States. it might be met to its undoing by the case of *Angel* v. *Bullington,* 330 U. S. 183, on the thory that based on the *Crain* case (209 U. S. 211) appellant had a right of appeal to the Supreme Court of the United States from the final judgment of the State Supreme Court in this case and by not availing of that right of appeal cut itself off from the right ever to get the Supreme Court of the United States to reverse the State Supreme Court for denying appellant its constitutional rights by the device of holding that a suit against the Revenue Commissioner of the State of Georgia as a wrongdoer is a suit against the State of Georgia as to which the State has not consented to be sued and is not maintainable. The Georgia statutes as to remedy are in such a confused and uncertain state that appellant's apprehension above expressed is not fanciful but has real basis. Hence to avoid such an eventuality as that just pointed out, appellant insists on its right to appeal to the Supreme Court of the United States from said final judgment of the State Supreme Court.

8. Said judgment of which appellant seeks review in the Supreme Court of the United States upon appeal is final, the said State Supreme Court having left nothing to be done by the trial court except the ministerial act of dismissing the suit pursuant to the direction of the State Supreme Court. *Gospel Army* v. *City of Los Angeles,* 331 U. S. 543. The Supreme Court of the State of Georgia

is the highest Court of the State of Georgia in which a decision in this suit could be had.

9. The Federal question involved is substantial, being whether Georgia laws (the Georgia statute and the provision of the Georgia Constitution set forth in numbered Paragraph 2 hereof) purporting to authorize the State and certain of its political subdivisions to tax *ad valorem* appellant's Charter Tax Lines beyond what is permitted by the provision of Section 15 of its charter (which provision is quoted on Page 5 hereof) are as applied to appellant repugnant to the contracts provision (Article I, Section 10, Paragraph 1) of the Constitution of the United States and void.

There is also involved the substantial question of whether this is a suit against the Revenue Commissioner of Georgia as a wrongdoer or a suit against the State of Georgia itself.

10. Copy of the opinion and order of the trial court is attached hereto as Appendix V. The opinion of the State Supreme Court has not yet been officially reported, but has been published in 49 S. E. 2d 26, (Advance Sheets, No. 1, September 16, 1948.) A copy of said opinion of the State Supreme Court is attached hereto as Appendix VI. And a copy of said final judgment of the State Supreme Court entered pursuant to its said opinion, together with a copy of both of the State Supreme Court's said orders denying appellant's motions to rehear is attached hereto as Appendix VII.

This 13th day of October, 1948.

JAMES E. HARPER,
W. INMAN CURRY,
REMBERT MARSHALL,
*Attorneys for Georgia Rail Road & Banking Company, Appellant.*

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## APPENDIX "I"

28 U. S. C. § 344. (Judicial Code, section 237.) Appellate jurisdiction of decrees of State courts; certiorari.

(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal. The appeal shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the appeal.

28. U. S. C. § 861a. Writ of error abolished; substitution of appeal.

The writ of error in cases, civil and criminal, is abolished. All relief which prior to January 31, 1928, could be obtained by writ of error shall hereafter be obtainable by appeal. (Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54.)

28 U. S. C. § 861b. Statutes governing writs of error to apply to appeals.

The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error. (Jan. 31, 1928, ch. 14, § 2, 45 Stat. 54; Apr. 26, 1928, ch. 440, 45 Stat. 466.)

Title 28, United States Code, Section 1257. State courts; appeal; certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * * *

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

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## APPENDIX "II"

The Act of the General Assembly of Georgia, approved February 28, 1874, and published in Georgia Laws, 1874, pages 107 et seq. is as follows:

*An Act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this Act.*

§ 26. Section I. *The General Assembly do enact,* That, from and after the passage of this Act, the presidents of all the railroad companies in this State shall be required to return, on oath, annually, to the Comptroller General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State, and that said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies which are required by law to be made to the Comptroller General.

§ 27. Sec. II. *Be it further enacted,* That said presidents shall pay to the Comptroller General the taxes assessed upon the property of said railroad companies, and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the Comptroller General shall proceed to enforce the collection of the same, in the manner provided by law for the enforcement of taxes against the other incorporated companies hereinbefore mentioned.

§ 28. Sec. III. *Be it further enacted,* That if any railroad company affected by the first and second sections of this

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Act desires to resist the collection of the tax herein provided for, said company, through its proper officer, may, after making the return required in the first section of this Act, and after paying the tax levied on such corporation by the tax act for 1873, and continuing to pay the same while the question of its liability under this Act is undetermined, resist the collection of the tax herein provided for by filing an affidavit of illegality to the execution or other process issued by the Comptroller General aforesaid, and stating fully and distinctly the grounds of resistance, which shall be returnable to the Superior Court of Fulton County, to be there determined as other illegalities, only the same shall have precedence of all cases in said Court, as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality, on the part of the Comptroller General and of said corporation, in which cases the Comptroller General shall be represented by the Attorney General of the State, or such other attorney as the Governor may select, and if the grounds of such illegality be not sustained, the Comptroller General shall, after crediting the process aforesaid with amount paid, proceed to collect the residue due under the provisions of the Act, and if, at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, then said illegality must be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax *fi. fa.* issued by the Comptroller General.

Sec. IV. Repeals conflicting laws.

Approved February 28, 1874.

(Copied from Ga. L. 1874, pages 107 and 108.)

## APPENDIX "III"

Sections 92-2602, 92-2603 and 92-2604 of the Georgia Code of 1933 are as follows:

92-2602 (1032) Presidents to make returns.—The presidents of all the railroad companies, including street railroads, dummy railroads, and electric railroads in this State shall be required to return on oath, annually, to the Comptroller General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State; and said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies, which are required by law to be made to the Comptroller General: Provided, that the said railroads shall be taxable for city purposes as other property is taxed for city purposes, and any law making railroad companies taxable by counties will be applicable to street railroad companies of every character. (Acts 1874, p. 107; 1889, p. 36.)

92-2602. (1033) Presidents to pay taxes assessed.—Said presidents shall pay to the Comptroller General the taxes assessed upon the property of said railroad companies; and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the Comptroller General shall proceed to enforec the collection of the same in the manner provided by law for the enforcement of taxes against other incorporated companies. (Acts 1874, p. 107.)

92-2604. (1034) Illegality to resist tax; venue.—If any railroad company affected by the preceding sections desires to resist the collection of the tax therein provided for, said company through its proper officer may, after making the return required in section 92-2602, and after paying the tax levied on such corporation and continuing to pay the same while the question of its liability herein is undetermined, resist the collection of the tax above provided for, by filing an affidavit of illegality to the execution or other process issued by the Comptroller General, stating fully and dis-

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tinctly the grounds of resistance, which shall be returnable to the superior court of Fulton County, to be there determined as other illegalities; the same to have precedence of all cases in said court as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality, in which case the Comptroller General shall be represented by the Attorney General of the State. If the grounds of such illegality are not sustained, the Comptroller General shall, after crediting the process aforesaid with the amount paid, proceed to collect the residue due under the provisions aforesaid; and if, at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, said illegality shall be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax execution issued by the Comptroller General. (Acts 1874, p. 107; 1931, pp. 7, 38.)

(Copied from Code of Georgia of 1933.)

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## APPENDIX "IV"

Paragraphs 22 and 23 of the complaint are as follows:

22. Petitioner desires to contest the effort of the Defendant to assess said property for taxation as hereinbefore set out, but is advised by Counsel and, therefore, alleges that there are grave doubts and uncertainties as to the method to be followed in so doing for the following reasons:

(a) Petitioner is advised that Defendant is proceeding under the Act of 1918, page 232 (Chapter 92-61 of the Code of 1933) which provides for assessments against property owners failing to return or grossly under-valuing their property, and which provides, in Section 92-6104, that a taxpayer who disputes the taxability of this property may raise the question by petition in equity in the Superior

Court of Fulton County. Chapter 92-61 of the Code of 1933 may not be applicable in this case because:

(1) Petitioner has not omitted to return its property for taxation for the years 1939-1945 inclusive, and has not under-valued the property which it has returned for those years, and because.

(2) The Act of 1918, page 232 or, at least, Section 92-6104 in the Code of 1933, may have been repealed by the Act of 1937-38 Ex. Sess. page 77, providing in Section 44 for review by the Board of Tax Appeals of assessments made by the State Revenue Commission and said provisions of said Act of 1937-38 may, in turn, have been repealed, as to questions involving taxabilty, by the provisions of the act of 1941, page 200 (Code of 1933, Section 92-8426-a) withdrawing from the Board of Tax Appeals the right to review assessments entered by the State Revenue Commissioner except those entered by the Commissioner on tax returns for ad valorem taxation required to be made to him.

(b) Both the Act of 1918, page 232 (Code of 1933, Chapter 92-61) and the applicable provisions of the Act of 1937-38, Ex. Sess. page 77 (if the same have not been repealed by the Act of 1941, page 200, Code Section 92-8426-a) may have been repealed by the Act of 1943 page 204 (Code of 1933, Section 92-8426-d to 92-8426-f) which provides, by reference to Section 92-8446 of the Code of 1933, for a review of assessments made by the State Revenue Commissioner by appeal to the Superior Court of the County in which is located the taxpayer's principle place of doing business or in which the taxpayer's chief or highest corporate officer resident in this State maintains his offices which, in Petitioner's case, would be the Superior Court of Richmond County, Georgia.

(c) The Act of 1943, page 204 (Code of 1933, Section 92-8426-d) provides that nothing therein contained "shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality." The Act of 1931, page 7 (Code of 1933, Section 92-7301) gave to a tax-

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payer the right to test the question whether a tax assessed by the State Revenue Commissioner was legally due by affidavit of illegality, but Petitioner is advised that doubt exists as to whether that Act was repealed by the Act of 1937-38, Ex. Sess., page 77 and, therefore, as to whether Petitioner would have the right to test the question whether this tax is legally due by affidavit of illegality. If said Act of 1931 has been repealed, then there is doubt as to whether Petitioner has the right to test by affidavit of illegality the question whether the taxes involved in this case are legally due, because the only other right given to a taxpayer who makes returns to the State Revenue Commissioner to file an affidavit of illegality is to be found in Code Section 92-2604, and it has been held by the Supreme Court of Georgia, that that remedy is only open to taxpayers who have made their returns. While Petitioner contends that it has made returns of all its property subject to ad valorem taxation, Defendant contends that it has not.

23. Petitioner shows that for the reasons set forth in the foregoing paragraph, Petitioner's remedy to contest its liability for the assessments which Defendant proposes to make, by or through any statutory proceedings or proceedings at law, is highly doubtful and uncertain, and Petitioner can not safely risk an adjudication as to the proper remedy by following either the procedure outlined in Section 92-6104 of the Code of 1933 or the procedure outlined by the Act of 1938, as it has been amended for the reason that, once the assessment is made, the taxpayer must present the appeal under the Act of 1938, as amended, within thirty days, if that be the remedy. Thus if Petitioner seeks to contest the taxability of said property by a petition in equity, as authorized by Section 92-6104 of the Code of 1933, and it should be determined that that section and the procedure there authorized has been repealed or superseded by the Act of 1938, it would then be too late to appeal from the assessment. On the other hand, if Petitioner should appeal from the assessment within thirty days, and it should thereafter be determined that Petitioner's remedy was by following the procedure outlined in Section 92-6104 of the Code of 1933, with the result that Petitioner's appeal would

be dismissed, Petitioner would then be in danger of its *petition in equity being barred on account of laches. If* Petitioner should thus be placed in a position in which neither the procedure outlined in Code Section 92-6104 nor that outlined in Sections 8426-d and 92-8446 was open to it, it is doubtful, for the reasons hereinbefore stated, whether Petitioner could proceed by affidavit of illegality, so that Petitioner might be remediless.

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## APPENDIX "V"

OPINION AND ORDER OF TRIAL JUDGE

Number 154498

Fulton Superior Court

GEORGIA RAILROAD & BANKING COMPANY

*v.*

GLENN S. PHILLIPS, State Revenue Commissioner

ORDER ON DEMURRERS AND MOTION OF DEFENDANT

The case is before the Court on the original and renewed demurrers of the defendant to the plaintiff's petition as amended, and there is also a motion before the Court to dissolve the restraining order previously granted upon stated grounds.

1. On the demurrers to the petition as amended. The petition in this case and the questions raised by the demurrers are in many respects and substantially the same questions that were raised in *Southwestern Railroad Company v. Thompson,* State Revenue Commissioner, Number 154499 of this court, in which this Court on March 18, 1946, overruled all the general and special demurrers. A majority of the demurrers in this case are similar and identical to the questions raised in the Southwestern case, and the reasons given in that case require a similar ruling in this

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case. However, some additional questions are raised by the demurrers. One question is whether or not the branch line known as the Warrenton branch is subject to exemption as a charter tax line, and, second, it is contended that the extension of the Georgia Railroad from Madison to Atlanta does not come within the claimed tax exemption provision of the original charter of the railroad. Though the four mile branch of the Georgia Railroad from Camak to Warrenton may not have been mentioned by name in the many cases litigated in the State and Federal courts in regard to whether the property of the Georgia Railroad was free from ad valorem taxation, yet apparently no question was ever raised in any of these cases that this branch was not a part of the Georgia Railroad which was constructed by virtue of the original charter granted to the railroad by the State, and no effort has been made on the part of the taxing authorities of the State to assess or collect taxes against this branch. It appears from the Acts of the General Assembly that the authority to construct this branch was authorized by the General Assembly in the form of an amendment to the charter of the Georgia Railroad & Banking Company. There is nothing in the original charter or the amendment thereto that would forbid the corporation from treating this Warrenton branch as a part of its railroad system, and it appears to have been the purpose of the State in limiting the rate or method of taxation of the property to exempt all of the railroad property that was constructed by virtue of its charter and amendments thereto.

As to the line running from Madison to Atlanta, that part of the line was expressly held to be part of the charter tax line in the case of *Georgia Railroad and Banking Company v. Wright, Comptroller General*, 132 Fed. 912, affirmed 216 U. S. 420, (which judgment is plead as being *res adjudicata* in this case). Judge Newman in his decree in that case expressly held "that the charter (exemption) covers complainant's main railroad between the cities of Augusta and Atlanta."

Wherefore, it is considered, ordered and adjudged that the general and special demurrers, original and as made

and renewed after the filing of amendments by the plaintiff, be and are hereby overruled on each and every ground.

2. On the motion of defendant to dissolve the restraining order as heretofore granted for several reasons set out in this motion, the Court is of opinion that only one of the grounds therein requires any explanation for the order that is to be entered on this motion, and that is the ground that "a declaratory judgment is not the proper remedy in this case."

The Court is of the opinion that even if this petition be construed as a petition seeking solely a declaration of rights, it could be sustained under the provisions of the Declaratory Judgment Law of 1945, but is also of the opinion that it is not only an action which seeks a declaration of rights but is also one seeking relief in equity which can be granted regardless of the sufficiency of the petition as being one under the Declaratory Judgment Law.

In its essence the petition is one brought under the old and well known remedy in equity and known as a bill of peace, and the facts in this petition fall clearly within the purview of Code Section 37-1501 which provides:

"It being the interest of this State that there shall be an end of litigation, equity will entertain a bill of peace:

"1. To confirm some right which has been previously satisfactorily established by more than one legal trial, and is likely to be again litigated."

"2. To avoid a multiplicity of suits by establishing a right, in favor of or against several persons, which is likely to be the subject of legal controversy, or in other similar cases."

One of the definitive purposes of a bill of peace is to establish and perpetuate the rights which a person claims and where several unsuccessful attempts have been made to overthrow them, and justice and right require that the person be perpetually enjoined from asserting them. *Ritchie v. Dorland*, 6 Calif. 33. Where a party has successfully maintained a position in more than one litigation

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over the same subject matter and he is threatened with further litigation about the same matter, he may resort to equity to enjoin further litigation, though he would have a right to plead abatement or in bar the previous judgment. See *Foltz v. St. Louis etc. Railroad Company*, 60 Fed. 316; *Laursen v. Lowe*, 197 N. E. 597 (Ohio); *Field v. Early*, 45 N. E. 197 (Mass.); *Primm v. Raboteau*, 56 Mo. 407.

The case of *McIntyre v. Harrison, Comptroller General*, 172 Ga. 65, supports the view that we take. There a number of plaintiffs sought to enjoin the Comptroller General from attempting to collect taxes under a statute which the plaintiffs claimed did not impose a tax, and the equitable ground upon which plaintiffs brought suit for injunction was to avoid multiplicity of actions. In holding that the action was not subject to demurrers of the defendant, the court held that (a) an injunction will lie to enjoin the collection of tax under a statute which does not authorize its imposition when the proceeding is brought by a number of persons against whom it is sought to enforce the tax upon the equitable principle of avoidance of multiplicity of actions, and (b) that injunction was the proper remedy to resist the enforcement by the Comptroller General of such tax.

It is generally recognized that a plaintiff may ask for a declaration of rights and at the same time seek independent equitable relief. See *Rennick v. Hay*, 106 Atl. 547 (N. J.); *Reese v. Levin*, 123 So. 809 (Fla.); *Brix v. Peoples Mutual Life Insurance Company*, 37 Pac. (2) 448 (Calif.); and *Holly etc. Corporation v. Fritzler*, 296 Pac. 206 (Wyo.). In the last cited case the court in dealing with this question said:

"Under section 1 of our Declaratory Judgments Act, rights and other legal relations may be declared 'whether or not further relief is or could be claimed.' The statute accordingly seems to contemplate that relief for declaration of rights may be considered as additional relief which courts have not ordinarily heretofore granted, and which may be granted in any action whether at law or in equity. That view is clearly borne out by the authorities heretofore cited. Plaintiff by praying for a declaration of rights merely substituted that relief for the relief ordinarily prayed in an

action in equity. He did not, we think, thereby abandon his claim that the action was one in equity, in so far as the allegations in the petition justified its consideration as such. And in fact plaintiff prayed for equitable relief in addition to the relief for declaration of rights by the very fact that he prayed relief against all the defendants. If this view is correct, and we think it is, then we need but to consider whether, though a separate contract with each of the several defendants is involved, the case is nevertheless one of those coming within the jurisdiction of a court of equity."

The Court is, therefore, of the opinion, even if the case be construed as not being sufficient under the Declaratory Judgment Act, it does set forth a cause of action as a bill of peace.

All grounds and prayers of said motion to dissolve the restraining order heretofore granted are overruled and denied, and said prior restraining order as granted against M. E. Thompson, State Revenue Commissioner, is continued as of force until further order of the court against Glenn S. Phillips, State Revenue Commissioner.

This 16th day of December, 1947.

(S.) Bond Almand,
*Judge, Superior Court, Atlanta Circuit.*

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## APPENDIX "VI"

SUPREME COURT OF GEORGIA

Decided June 11, 1948.

No. 16178

Musgrove

*v.*

Georgia Railroad & Banking Company

By the Court:

The charter of the plaintiff railroad company granted in 1833 (Ga. L. 1833, p. 256) provided: "The stock of the

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said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said rail roads or any one of them: and after that, shall be subject to a tax not exceeding one half per cent per annum on the net proceeds of their investments."

In the instant suit, brought by the company against the State Revenue Commissioner, it sought among other things to obtain a declaratory judgment decreeing that such charter provision constitutes a contract between the plaintiff and the State of Georgia, valid and binding upon the State and its officers in perpetuity, and prayed also for perpetual injunction to restrain the defendant and his successors in office from assessing certain of its railroad properties described as "charter tax lines" from ad valorem taxation. *Held:*

Whether the petition be construed as one brought against the defendant in his official capacity or in his individual capacity, it was in substance and effect an action against the State and was not maintainable, the State not having consented to be thus sued. The court therefore erred in overruling the third ground of general demurrer presenting this contention. Other grounds of demurrer, whether general or special, should not have been passed upon, and direction is given that ground 3 of the general demurrer be sustained and that the petition be thereupon dismissed, without any ruling or judgment as to other grounds, and without prejudice to either party or the State with respect thereto.

On October 15, 1945, Georgia Rail Road & Banking Company filed a petition in the superior court of Fulton County "against M. E. Thompson, in his representative capacity as State Revenue Commissioner of the State of Georgia," seeking a declaratory judgment and injunction, the object of the suit being in part to prevent the defendant from assessing for ad valorem taxation two lines of railroad owned by petitioner, one extending from Augusta to Atlanta, and one from Union Point to Athens, Georgia; it being alleged and contended that, under its charter and also under previous adjudications, these railroad properties are exempt from ad valorem taxation. The petition was sanc-

tioned and ordered filed, and a restraining order was issued.

On December 5, 1945, the defendant as thus sued filed a general and special demurrer to the petition.

The plaintiff offered two amendments, both of which were allowed on December 16, 1946, subject to demurrer or other objection. One, designated as "Amendment No. 1 of Dec. 16th, 1946", prayed that the petition be amended by striking from the first and numbered paragraph the allegation that said petition is "against M. E. Thompson, in his representative capacity as State Revenue Commissioner of the State of Georgia," and by inserting in lieu thereof the allegation that said petition is "against M. E. Thompson, who is State Revenue Commissioner of the State of Georgia." No objection was ever made to the allowance of this amendment. The other amendment, designated as "Amendment No. 2, of Dec. 16, 1946," sought to add a third line of railroad, extending from Camak to Warrenton, Georgia, as to which third line it was alleged that plaintiff is entitled to the same relief as prayed with respect to the other two lines. In his order allowing this amendment subject to demurrer or objection, the judge enlarged his former restraining order so that it would include such third line, as prayed.

On November 24, 1947, on a "plea for substitution of party" filed by Glenn S. Phillips, who succeeded Thompson as State Revenue Commissioner, the judge entered an order, substituting Glenn S. Phillips as a party defendant in the case and ordering that the cause proceed "against the said Glenn S. Phillips in the same manner and with the same consequences as if he had been the original defendant therein." Such "plea for substitution of party" alleged the appointment of Glenn S. Phillips as State Revenue Commissioner, and his adoption of the pleadings of the original defendant in said case.

On the same date, November 24, 1947, the defendant Phillips filed objections to allowance of the amendment of December 16, 1946, adding the third line of railroad, and to the inclusion of this line within the former restraining order. Also on the same date, the defendant "after all the amendments filed by the plaintiff have been allowed, subject to the objections to said amendments . . . adopts and renews its demurrers previously filed, both general and

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special, on each and every ground therein set out to the original petition, and also to the petition as amended, and says that said petition as amended should be dismissed for each and every reason set out in the original demurrers." Other grounds of demurrer, both general and special, were then stated.

On the same date the judge entered an opinion and judgment (1) overruling "the general and special demurrers, original and as made and renewed after the filling of amendments by the plaintiff . . . on each and every ground," and (2) refusing "to dissolve the restraining order heretofore granted." It was stated in the order that "Even if the case be construed as not being sufficient under the declaratory judgment act, it does set forth a cause of action as a bill of peace." The defendant excepted.

In ground 3 of the general demurrer, it was expressly urged that the suit "is in reality an action against the State, and the State has not consented to be made a party to this action or for the action to proceed against it." The same contention is expressly urged in this court by Phillips as plaintiff in error.

The petition as amended contained substantially the following allegations:

3. The defendant, as State Revenue Commissioner, is empowered by statute to assess railroad property for taxation by the State and its political subdivisions and to issue executions therefor, but is exceeding the authority given to him by the statutes of the State of Georgia and is acting unlawfully and in violation of the constitution of the State of Georgia and of the United States, for tthe reasons hereinafter set out.

4. On August 28, 1945, the defendant wrote the following letter jointly to petitioner and to C. H. Phinizy, its president:

"Dear Sirs: The Georgia Railroad & Banking Company having failed to file full and complete tax returns with the State Revenue Commission of the State of Georgia for the years 1939 through 1945, inclusive, you are hereby notified of such delinquency and are demand to make full and com-

plete tax returns to the State Revenue Commissioner within twenty days, as provided by law, covering all taxable property of said Georgia Railroad & Banking Company, for State, County, Municipal and school taxes. Yours very truly, Department of Revenue, M. E. Thompson, Commissioner. Blanks will be furnished upon request."

5. Petitioner denies that, for the years 1939 through 1945 inclusive, or for any one of those years, it failed to file full and complete tax returns, but alleges that it has filed such returns and paid all taxes for which it was lawfully liable. Petitioner has therefore declined to make any returns to the State Revenue Commissioner in addition to the returns already made.

6. Nevertheless defendant has threatened to and will, unless restrained by this court, assess against petitioner ad valorem taxes with respect to certain of its lines of railroad and their appurtenances, namely, the main line from Augusta to Atlanta; the Athens Branch, from Union Point to Athens (the approximate length of each being stated); both of which lines were constructed under and by virtue of the Act of the General Assembly of Georgia approved December 21, 1833, hereinafter referred to; and the branch from Camak to Warrenton, a distance of four miles, which was constructed under and by virtue of the Act of the General Assembly of Georgia assented to December 22, 1835, which amended the charter of petitioner so as to authorize the construction of such branch line; said three lines of railroad being hereafter referred to as the "charter tax lines,"

7. Petitioner's charter tax lines are not subject to ad valorem taxation, as will more fully hereinafter appear.

8. Petitioner is a railroad corporation chartered as "Georgia Rail Road Company" by the State of Georgia by special act of the General Assembly approved December 21, 1833, the name of said company having been changed to "Georgia Rail Road & Banking Company" by a special act of the General Assembly approved December 18, 1835.

9. By section 15 of said act approved December 21, 1833, which is now and at all times since its approval has been a

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part of petitioner's charter, it is enacted as follows: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said rail roads or any one of them: and after that, shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments."

10. The provision of petitioner's charter as above quoted is applicable to petitioner's said charter tax lines, all of which were completed many years prior to 1939.

11. In addition to its charter tax lines petitioner owns other lines of railroad, herein referred to as its "general tax lines," to which the quoted provisions of its charter are not applicable.

12. Petitioner has always paid taxes on the general tax lines on the ad valorem basis. The assessment in question in this case is with respect to the charter tax lines of petitioner. Petitioner has never paid ad valorem taxes with respect to the charter tax lines, but these lines have always been taxed on their net income under the provisions of petitioner's charter quoted in paragraph 9 hereof. Petitioner has regularly each year made tax returns as required by law of the charter tax lines on the basis of the net income, and said returns have been accepted by the State tax authorities, and said returns having been accepted by the State and the tax paid thereon, they cannot now be opened.

The net income payable under the charter is not the rental received by petitioner from its lessees, but is the net income from the operation of the charter tax lines. The net income of the charter tax lines has always been computed in this way. The taxes now payable on one-half of 1% of net income are very much less than the taxes payable on the ad valorem basis at the prevailing tax rates.

13. On May 7, 1881, petitioner, in the exercise of the power conferred upon it by its said charter, leased its railroad properties to William M. Wadley for the term of

99 years from April 1, 1881, and Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company are Wadley's successors in interest to said lease.

14. The defendant claims that in assessing the taxes here complained of he is proceeding under the act of the General Assembly of Georgia approved February 28, 1874 (Ga. L. 1874, p. 107), entitled "An Act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal the charters of such companies, respectively, as may conflict with the provisions of this Act" (Code, §§ 92-2602, 92-2603, 92-2604), and under Article 1, section 3, paragraph 3 of the constitution "as amended August 7, 1945" which reads: "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void;" although the constitution of 1877 provided "No . . . law impairing the obligation of contracts . . . shall be passed," and this provision was retained "in the constitution as amended August 7, 1945."

15. That part of section 15 of petitioner's charter quoted in paragraph 9 hereof, is an irrevocable and inviolable contract between the State of Georgia and petitioner, and cannot be modified or changed by any subsequent legislative act of the State or by any subsequent provision in the State constitution. The said act of 1874, and article 1, section 3, paragraph 3 of the constitution, referred to in paragraph 14 hereof, are unconstitutional and void in that they are contrary to article 1, section 10, paragraph 1 of the constitution of the United States, which provides that "No State . . . shall pass any . . . law impairing the obligation of contracts," in that said act of 1874 and said provision of the constitution of Georgia (1945) undertake to subject the charter lines of petitioner to ad valorem taxation in violation of the aforesaid provision of section 15 of petitioner's charter. For the same reason, said act of 1874 is unconstitutional and void, because it violates the above stated provision of the constitution of Georgia of 1877, as amended August 7, 1945, declaring that "No . . . law impairing the obligation of contracts . . . shall be passed."

For these reasons the assessment which the defendant has

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threatened to make and which, unless restrained, he will make against petitioner for ad valorem taxes on petitioner's charter tax lines for the years 1939-45, inclusive, are not authorized by law or by the constitution, and the acts and things threatened by the defendant are illegal and in violation of the rights of petitioner.

16. If defendant is proceeding under any other act of the General Assembly, or under any provision of any constitution of the State of Georgia, passed or adopted subsequent to December 21, 1833, any such other act or constitutional provision is null and void because in violation of article 1, section 3, paragraph 2 of the constitution of Georgia (contract clause), in that it seeks to subject the charter tax lines of petitioner to ad valorem taxation in violation of the aforesaid provision of section 15 of petitioner's charter.

17. "Article 1, section 3, paragraph 3 of the constitution of Georgia of 1877, as amended August 7, 1945," which provides, "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void," is itself unconstitutional and void when applied to the taxation of the charter tax lines of petitioner on an ad valorem basis, because the same is contrary to article 1, section 10, paragraph 1 of the United States constitution, which provides that "No State shall . . . pass any . . . law impairing the obligation of contracts," because it seeks to subject the charter tax lines of petitioner to ad valorem taxation in violation of section 15 of petitioner's charter. In other words, the State of Georgia cannot avoid the constitution of the United States by repealing its own contracts or by declaring its own contracts void.

18. The said provision in the constitution of Georgia which provides that "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void" is by its own terms not applicable in this case. It is in terms prospective and not retrospective. The defendant is seeking to tax petitioner for ad valorem taxes on its charter tax lines for the years 1939 to 1945, both inclusive. Said provision of the constitution

does not purport to be retroactive in operation, or to declare any exemption from taxation theretofore granted to be void ab initio, but only to declare them "henceforth null and void." Accordingly, said constitution does not purport to authorize and does not authorize the act threatened by the defendant; nor does the same purport to apply to the provisions of petitioner's charter.

19. In 1874, shortly after passage of the above mentioned act of February 28, 1874, which purported to tax all railroad companies on an ad valorem basis and to repeal the charters of such companies as might conflict with the provisions of said act, the Comptroller General of Georgia issued executions against petitioner for taxes claimed under said act. To these executions petitioner filed an affidavit of illegality in the superior court of Fulton County, as provided in said act, and on the hearing thereof the superior court sustained the affidavit. The judgment of the superior court was affirmed by the Supreme Court of Georgia in the State of Georgia v. Georgia Railroad & Banking Company, 54 Ga. 424. Petitioner then quotes headnotes 1, 2, and 3 of that decision. "Petitioner pleads the judgment in that case as res adjudicata of the issues in this case, and as an estoppel by judgment of said issues, to-wit, that the lines described in this petition as charter tax lines are not subject to ad valorem taxes, but are taxable only on their net income under the special provisions of petitioner's charter; and the judgment being of this honorable court petitioner prays the court to take judicial notice thereof."

20. On January 7, 1904, petitioner filed its bill in equity in the Circuit Court of the United States for the Northern District of Georgia against William A. Wright, in his official capacity as Comptroller General of the State of Georgia, alleging, among other things, that the defendant claimed, first, that petitioner should pay a direct tax on the value of its railroad and equipment in excess of $4,156,000, and second, that petitioner should pay a tax on its franchises, said second claim being made under an act of the legislature approved December 17, 1902, entitled "An Act to provide for and require the payment of taxes on

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franchises, and to prescribe the method for the return and payment of said taxes," and that the Comptroller General "is threatening and is about to proceed to collect said illegal taxes." Petitioner in said bill averred that said purpose and attempt to collect said taxes are illegal and void, because petitioner's charter is a contract between petitioner and the State of Georgia, and by said contract the State bound itself to exact no taxes from petitioner on account of its investments in the charter tax lines of railroad aforesaid exceeding one-half of one per cent of the net earnings of said investments, and said threatened action of said comptroller general and said act of the General Assembly of December 17, 1902, would impair the obligation of said contract, and are unconstitutional under paragraph 1 of article 10 of the amendment to the United States constitution. Petitioner prayed that it be adjudged that it is liable only for a tax to the State not exceeding one-half of one per cent of petitioner's investments in its railroad, and that the defendant comptroller general be enjoined from proceeding to collect any other tax from petitioner. On July 3, 1907, said Circuit Court entered a decree in said case enjoining the comptroller general as prayed. The comptroller general appealed to the Supreme Court of the United States from said decree, and by a decision rendered February 21, 1910, 216 U. S. 420, 54 L. ed. 544, that court affirmed the decree in so far as it related to the property referred to as petitioner's charter tax lines, and reversed it only in so far as it related to petitioner's branch line from Barnett to Washington, Georgia, which petitioner does not now include in its charter tax lines. Excerpts from the decision of the United States Supreme Court are contained in this paragraph of the petition, which paragraph concludes as follows: "Petitioner attaches hereto as exhibit A a copy of the entire record of said case [in the said Circuit Court and in the United States Supreme Court] and pleads the final judgment in said case as res adjudicata of the issues in this case that the lines described in this petition as charter tax lines are not subject 'to ad valorem taxes, but are taxable only on their net income' under the special pro-

visions of petitioner's charter, and petitioner also pleads said judgment as an estoppel upon said issues."

21. By section 78 of the act approved August 28, 1931, (Ga. Laws 1931, pages 7 et seq.), a State Revenue Commission was created consisting of the comptroller general and two commissioners, and by section 4 of the act approved January 3, 1938 (Ga. L. Ex. Sess. 1937-38, pages 77 et seq.), the State Revenue Commissioner was vested with all the power and authority, and was required to perform all the duties, formerly vested in the State Revenue Commission with certain exceptions not here material, and was also vested with all power and authority, and was required to perform all the duties relating to taxation theretofore vested in any State administrative official or State department, so that now all duties with respect to the taxes assessed against petitioner have devolved upon the defendant in this case, who in these respects is the successor in office of the former comptroller general.

22. Petitioner desires to contest the effort of the defendant to assess said property for taxation as hereinbefore set out, but is advised by counsel and, therefore, alleges that there are grave doubts and uncertainties as to the method to be followed in so doing, for the following reasons:

(a) Petitioner is advised defendant is proceeding under the act of 1918, page 232 (Chapter 92-61 of the Code), which provides for assessments against property owners failing to return or grossly undervaluing their property, and which provides, in section 92-6104, that a taxpayer who disputes the taxability of his property may raise the question by petition in equity in the superior court of Fulton County. Chapter 92-61 of the Code may not be applicable in this case because:

(1) Petitioner has not omitted to return its property for taxation for the years 1939-1945 inclusive, and has not undervalued the property which it has returned for those years, and because

(3) The act of 1918, page 232, or, at least, section 92-6104 of the Code, may have been repealed by the act of

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1937-38, Extra Session, page 77, providing in section 44 for review by the Board of Tax Appeals of assessments made by the State Revenue Commission, and said provisions of said act of 1937-38 may, in turn, have been repealed, as to questions involving taxability, by the provisions of the act of 1941, page 200, withdrawing from the Board of Tax Appeals the right to review assessments by the State Revenue Commission except those entered by the commissioner on the tax returns for ad valorem taxation required to be made to him.

(b) Both the act of 1918 and "the applicable provisions" of the act of 1937-38, page 77 (if the same have not been repealed by the act of 1941, page 200), may have been repealed by the act of 1943, page 204, which provides for a review of assessments made by the State Revenue Commissioner by appeal to the superior court of the county in which is located the taxpayer's principal place of doing business or in which the taxpayer's chief or highest corporate officer resident in this State maintains his office, which, in petitioner's case, would be the superior court of Chatham County.

(c) The act of 1943, page 204, provides that nothing therein contained "shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality." The act of 1931, page 7 (Code, § 92-7301), gave to a taxpayer the right to test the question whether a tax assessed by the State Revenue Commissioner was legally due, by affidavit of illegality, but petitioner is advised that doubt exists as to whether that act was repealed by the act of 1937-38 Extra Session, page 77, and, therefore, as to whether petitioner would have the right to test the question whether this tax is legally due by affidavit of illegality. If said act of 1931 has been repealed, then there is doubt as to whether petitioner would have the right to test by affidavit of illegality the question whether the taxes involved in this case are legally due, because the only other right given to a taxpayer to file an affidavit of illegality is to be found in Code section 92-3604 (§ 92-

2604f), and it has been held by the Supreme Court that that remedy is only open to taxpayers who have made their returns. While petitioner contends that it has made returns of all its property subject to ad valorem taxation, defendant contends that it has not.

23. For the reasons set forth in the foregoing paragraph, petitioner's remedy to contest its liability for the assessment which defendant proposes to make, by or through any statutory proceeding or proceedings at law, is highly doubtful and uncertain, and petitioner cannot safely risk an adjudication as to the proper remedy by following either the procedure outlined in section 92-6104 of the Code, or the procedure outlined by the act of 1938, as it has been amended, for the reason that, once the assessment is made, the taxpayer must present the appeal under the act of 1938, as amended, within thirty days. Thus if petitioner seeks to contest the taxability of said property by a petition in equity, as authorized by section 92-6104 of the Code, and it should be determined that that section and the procedure there authorized has been repealed or superseded by the act of 1938, it would then be too late to appeal from the assessment. On the other hand, if petitioner should appeal from the assessment within thirty days, and it should thereafter be determined that petitioner's remedy was by following the procedure outlined in section 92-6104 of the Code, with the result that petitioner's appeal would be dismissed, petitioner would then be in danger of its petition in equity being barred on account of laches. "If petitioner should thus be placed in a position in which neither the procedure outlined in Code section 92-6104 nor that outlined in section 92-8426-d and 92-8446 was open to it, it is doubtful, for the reasons hereinbefore stated, whether petitioner could proceed by affidavit of illegality, so that petitioner might be remediless."

24. An actual controversy exists between petitioner and defendant as to the matters and things set forth in this petition. Petitioner contends that its charter tax lines are not subject to ad valorem taxation by the State or any of its political subdivisions and are not subject to any other

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form of taxation save that provided by petitioner's charter, and that this is true despite the act of 1874, and article 1, section 3, paragraph 3 of "the constitution of 1877, as amended August 7, 1945." The defendant contends that under the constitution of 1877 and under said act of 1874 the charter tax lines of petitioner are subject to ad valorem taxation to the same extent as other lines of petitioner upon which it has already paid ad valorem taxes. The defendant further contends that whether or not the charter tax lines were subject to ad valorem taxation under the constitution of 1877, or under said act of 1874, said charter tax lines are subject to such ad valorem taxation under the constitution of 1945, and that said constitution is retrospective and retroactive in operation and subjects said charter tax lines to ad valorem taxation for years antedating the adoption of the constitution of 1945, as well as for future years. Petitioner contends that said constitution of 1887 as amended in 1945 is by its terms prospective only in operation and effect, with the result that it does not purport to subject said charter tax lines to taxation for years antedating the amendment of 1945, and that in so far as it undertakes or seeks to subject them to taxation for future years, it is unconstitutional because violative of article 1, section 10, paragraph 1 of the constitution of the United States, for all of the reasons hereinbefore stated. With respect to the years 1939 to 1945 the controversy between petitioner and defendant is not only actual but acute, in that defendant has stated his purpose to assess taxes against petitioner for all of said years, has threatened to do so and will do so unless enjoined. As to future years, the controversy is actual because the defendant has threatened to and will assess taxes against said charter tax lines for all future years.

25. Defendant is proceeding to assess petitioner's property for ad valorem taxation for the years 1939 through 1945, for State, county, municipal and school taxes and will so assess same unless the rights of the parties are determined before said assessment can be made, and, if they are not determined before said assessment can be made (and it is most unlikely that they can be) defendant will proceed

to issue executions against petitioner for the ad valorem taxes which he claims to be due for each of the seven years involved, and to levy said executions on petitioner's property unless he is enjoined.

26. If defendant is not enjoined as hereinafter prayed, he will proceed to assess petitioner's charter tax lines for ad valorem taxation for the years 1939-1945, inclusive. If petitioner's remedy against said assessment should be held in this proceeding to be under the provisions of the act of 1938 as amended, petitioner's appeal from said assessment must be entered within thirty days, failing which petitioner will be remediless. It is, therefore, necessary that defendant be restrained from assessing said property in order that the present status may be maintained and petitioner's rights preserved.

27. Wherefore, petitioner brings this suit, as authorized by the act of the General Assembly of Georgia of 1945, known as the declaratory judgment act, and shows that it is entitled to have this court determine and declare the rights and liabilities of the parties with respect to the controversy hereinbefore described, and particularly with reference to the taxability of the property referred to in this petition which the defendant proposes to and will assess for taxation as herein alleged, and that it is also entitled to such other and further relief as will eventually preserve and prevent violation and impairment of the contracts herein described.

Waiving discovery, petitioner prays:

(1) That the court will determine, adjudicate, and declare:

(a) That petitioner's charter tax lines hereinbefore described are exempt from ad valorem taxation for the years 1939-1945, both inclusive, and are not otherwise taxable except in the manner and method provided in petitioner's charter.

(b) That the defendant is without authority of law to enter ad valorem assessments against petitioner or said property, and that such assessments, if undertaken to be

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entered, will be void for all of the reasons stated in this petition.

(c) That the judgments entered in the cases heretofore decided by the Supreme Courts of Georgia and of the United States, which are referred to in the foregoing petition, are res adjudicata and constitute a final and conclusive determination forever binding upon the State of Georgia and its public officials as to the taxability of said property.

(d) That the court determine and declare that the defendant and his successors in office and all persons who are or may hereafter be charged with the duty of assessing and collecting taxes within the State of Georgia or any political subdivision thereof, should be perpetually enjoined from assessing said property for such taxation or endeavoring in any manner to collect ad valorem taxes thereon.

2. That, if the decree of this court should be made such that the rights and legal relations of the parties hereto can only be adjudicated in another proceeding now provided by the laws of Georgia, then this court will determine, adjudicate and declare whether the taxability of petitioner's charter tax lines can be determined by petition in equity to the superior court of Fulton County under the provisions of section 92-6104 of the Code, or by appeal from defendant's assessment to the superior court of the county in which is located petitioner's principal place of doing business or in which petitioner's chief or highest corporate officer, resident in this State, maintains an office, "under the provisions of sections 92-8446-d and 8446 of the Code of 1933 [§§ 92-8426.4, 92-8446, Ann. Code Supp.†], and also whether petitioner has the additional right to determine said question by affidavit of illegality."

3. That pending a determination of the questions presented by this petition and the declaration of the rights and liabilities of the parties with respect to the taxability of said property and the remedy to be pursued by the petitioner in contesting an assessment thereof by the defendant, the defendant as State Revenue Commissioner, and his

successors in office, be restrained and enjoined from assessing said property or any of same for ad valorem taxation for the years 1939 to 1945, inclusive, or any future years.

4. That pending a hearing and until further order of court, the defendant be temporarily restrained as prayed for in the foregoing paragraph.

5. For process.

6. For rule nisi as to injunction.

7. For general relief.

Downing Musgrove having succeeded Glenn S. Phillips as State Revenue Commissioner on June 10, 1948, and having moved on June 11, to be substituted as plaintiff in error, he was by order of this court, counsel on both sides consenting, substituted as plaintiff in error for Glenn S. Phillips, and was made "a party to this case in exactly the same capacity as Glenn S. Phillips would have continued to be a party to it had he continued in the office of State Revenue Commissioner of the State of Georgia."

Bell, Justice. The parties will be generally referred to herein as plaintiff and defendant, as they appeared in the trial court.

The third ground of the general demurrer filed by the original defendant, then State Revenue Commissioner, and adopted by his successor, who was substituted as party defendant, asserted that the suit "is in reality an action against the State of Georgia, and the State of Georgia has not consented to be made a party to this action or for the action to proceed against it." The defendant urges the same contention (among others) in this court; having excepted to the judgement overruling all grounds of demurrer to the petition as amended.

In the very nature of the contention stated, it is the first matter for consideration, for if this ground of demurrer was good the judgment should be reversed without any decision upon other questions. In other words, if the suit is in reality an action against the State and the State has not consented to be thus sued, it would be entirely out of place to decide anything as to liability of the state in such proceeding.

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The plaintiff does not claim that the State has in fact consented to be sued in this case, but, as to this phase, it simply contends that the suit is against the defendant as an individual, and is therefore not a suit against the State.

The suit was originally brought against the defendant "in his representative capacity as State Revenue Commissioner of the State of Georgia," but this express denomination was later stricken by amendment. Whether or not, in view of other references to the defendant as an official which remained in the petition after such amendment, it could be said that the petition as amended is *in name* a suit against the defendant solely in his individual capacity, is immaterial, if upon a consideration of the petition as a whole, including the relief which it seeks, it appears that the action is in reality a suit against the State, brought without its consent. "Where a suit is brought against an officer or agency of the State with relation to some matter in which the defendant represents the State in action and liability, and the State, while not a party to the record, is the real party against which relief is sought, so that a judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the State, will operate to control the action of the State or subject it to liability, the suit is in effect one against the State." Cannon v. Montgomery, 184 Ga. 588 (1), 591. See also Roberts v. Barwick, 187 Ga. 691 (2); Florida State Hospital for the Insane *v.* Durham Iron Co., 194 Ga. 350; Fleicher *v.* Duncan, 195 Ga. 309 (1). The statement just quoted accords with the generally accepted rule, and we are of the opinion that the present suit is an action against the State within this rule. See in this connection, 29 Am. Jur. 304-310, §§ 92-94.

The plaintiff railroad company was chartered by an act of the legislature in 1833, section 15 of which provided: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said rail roads or any one of them; and after that, shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments." Ga. L. 1833, p. 256.

The company alleges that defendant has demanded full and complete returns for the years 1939 through 1945, and will unless enjoined assess against petitioner ad valorem taxes with respect to its charter tax lines; also that "An actual controversy exists between petitioner and the defendant as to the matters and things set forth in this petition." On its part, the plaintiff contends and alleges that the quoted provision of its charter constitutes a contract between it and the State of Georgia exempting it from all ad valorem taxation; and it prays for a declaratory judgment adjudicating that such alleged contract does exist, and that it is irrevocable and inviolable. It also asks that certain previous decisions, State of Georgia *v.* Georgia Railroad & Banking Co., 54 Ga. 423; Georgia Railroad & Banking Co. *v.* Wright, 132 Fed. 912; Wright *v.* Georgia Railroad & Banking Co., 216 U. S. 420 (30 Sup. Ct. 242, 54 L. ed. 544), be established as res judicata in its favor and binding as against the State of Georgia and its officials as to the taxability of its railroad properties described in the petition. It further prays for a perpetual injunction against the defendant and his successors in office restraining them from assessing such properties for ad valorem taxation and from endeavoring in any manner to collect ad valorem taxes thereon. All of this, be it remembered, is based upon the contention that the provision as to exemption is a contract between plaintiff and the State of Georgia, valid and binding in perpetuity, so that the plaintiff is thus seeking a decree that would control the action and liability of the State and its officers forever, with respect to such matter.

The plaintiff alleges that the defendant claims to be proceeding under an act of the General Assembly passed in 1874 (Ga. L. 1874, p. 107) entitled "An act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this Act," and under article 1, section 3, paragraph 3 of the constitution of 1945, declaring that "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void." The peti-

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tion then attacks such statute as being unconstitutional and void under the contract clause of the State and Federal Constitutions, and also assails the quoted provision of the Constitution of 1945 as being in violation of such contract clause as contained in the Federal constitution. Wherefore, it is insisted by the plaintiff that the defendant is acting wholly without lawful authority, and that hence he is sued, and is properly sued, as an individual. It is thus contended that the suit is one against the defendant in his individual capacity and is not an action against the State.

It is a well recognized general rule that a suit to restrain a State official from executing an unconstitutional statute in violation of the plaintiff's rights and to his irreparable damage is not a suit against the State, for in such a case the officer is stripped of his official or representative character and is subject in his person to the consequences of his individual conduct. See, in this connection, Dennison Manufacturing Co. *v.* Wright, 156 Ga. 789; Ex Parte Young, 209 U. S. 123, 160; Greene *v.* L. & N. R. Co., 244 U. S. 499, 61 L. ed. 1285; Sterling *v.* Constantin, 287 U. S. 378, 77 L. ed. 375.

Seemingly, the same principle would apply where the officer claims to act under a provision of the State constitution, provided such provision is void as being in violation of the United States constitution, and is duly challenged. It has no application in the instant case, however, for, as shown above, the plaintiff is here seeking to enforce what it claims to be a contract with the State of Georgia, and the State therefore, as a corporate entity, has a distinct and direct interest in the subject matter of the litigation, as distinguished from its mere governmental interest in the enforcement of its laws for the general welfare.

In Hampton *v.* Board of Education of Florida, 90 Fla. 88, 105 Sou. 323, 42 A. L. R. 1456, it was said:

"The rule which forbids a suit against State officers because in effect a suit against the State applies only where the interest of the State is through some contract or property right, and it is not enough that the State should have a mere interest in the vindication of its laws, or in their enforcement as affecting the public at large or the rights

of individuals or corporations; it must be an interest of value in a material sense to the State as a distinct entity. Thus a suit against the Governor of a State, not by name, but solely in his official character, is a suit against the State; so also is a suit against State officers for the purpose of enforcing through them the performance of the contracts of the State, or to compel them to do acts which would impose contractual liabilities upon the State." See also the following decisions of the United States Supreme Court, where alleged contracts of States were involved. In re Ayers, 123 U. S. 443; Hans *v.* Louisiana, 134 U. S. 1; North Carolina *v.* Temple, 134 U. S. 22; Gunter *v.* Atlantic Coast Line Railroad Co., 200 U. S. 273, 285. The last mentioned case involved a claimed charter tax exemption. See also in this connection, Roberts *v.* Barwick, 187 Ga. 691, supra; Florida State Hospital *v.* Durham Iron Co., 194 Ga. 350, supra; 49 Am. Jur. 308, § 94; 59 C. J. 307, § 464. We are unable to see how the plaintiff railroad company could have an actual controversy with the defendant in his individual capacity with reference to the matters set forth in the instant petition.

Section 6 of the Declaratory Judgment Act provides: "No declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding involving the validity of a municipal ordinance or franchise, such municipality shall be made a party and shall be entitled to be heard as a party. If a statute of the State, or any order or regulation of any administrative body of the State, or any franchise granted by the State is alleged to be unconstitutional, the Attorney General of the State shall be served with a copy of the proceeding and shall be entitled to be heard." Ga. L. 1945, 137-8, Code, Ann. Supp., § 110-1106. In the instant case the court ordered that the Attorney General be served with a copy of the suit. The provision referred to, however, does not amount to consent of the State to be sued under such statute; nor has the plaintiff so contended. Compare Roberts *v.* Barwick, 187 Ga. 691, supra.

In view of what has been said, we conclude that the present suit is in substance and effect an action against the State and that it is not maintainable, the State not having

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consented to be thus sued. In the following cases the question here under consideration does not appear to have been raised by counsel or considered by the Court. Georgia Railroad and Banking Co. *v.* Wright, 132 Fed. 912; Wright *v.* Georgia Railroad & Banking Co., 216 U. S. 420. These cases are therefore to be considered only as physical precedents, with little, if any, persuasive force, as to such question. There may be still other cases that would be subject to the same observation.

We do not overlook the plaintiff's allegations to the effect that there are grave doubts and uncertainties as to what remedy it may pursue in contesting the effort of the defendant to assess its charter lines for ad valorem taxation. The petition referred to several statutes of this State relating to remedy, including injunction and affidavit of illegality, to wit: Ga. L., 1918, p. 232; Ga. L. Ex. Sess., 1937-38, p. 77; Ga. L. 1941, p. 200; Ga. L., 1943, p. 204, and prayed for a declaratory judgment as to remedy. The petition was not aided by such allegations and prayer with respect to remedies; for if, as we have held, the suit is in essence one against the State, no judgment should be rendered declaring what remedy or remedies would be available as against it, if any, as that would be a decision at least in part against the State, even though it has not consented to be sued, and is not even a party.

In Beers *v.* Arkansas, 61 U. S. 527, 529 (15 L. ed. 564), it was said: "It is an established principle of jurisprudence in all civilized nations that the sovereign can not be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." See also in this connection, Great Northern Life Insurance Co. *v.* Read, 322 U. S. 47, 88 L. ed. 1121; Ford Motor Co. *v.* Department of Treasury of Indiana, 323 U. S. 459, 89 L. ed. 389; Goldsmith *v.* The Augusta & Savannah Railroad

Co., 62 Ga. 468, 472; Goldsmith *v.* The Georgia Railroad Co., 62 Ga. 485, 494.

Nothing said in this opinion is intended as an expression or intimation upon any question relating to the merits of the plaintiff's contention as to exemption from ad valorem taxation, or upon any question as to what remedy, if any, the plaintiff might have if any of its money or property should be seized or levied upon for such taxes; the defendant having now done nothing more than threaten to make assessments,—according to the allegations of the petition.

It follows from what has been said that the court erred in overruling ground 3 of the general demurrer to the petition. The judgment overruling the demurrer on all grounds, whether general or special, should be vacated, and ground 3 of the general demurrer should be sustained and the petition dismissed, without any ruling or judgment as to other grounds, and without prejudice to either party or the State with respect thereto. And direction is given accordingly.

Judgment reversed, with direction. All the Justices concur except Wyatt, J., absent on account of illness, and Head, J., disqualified.

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## APPENDIX VII

The following is the judgment rendered by the Supreme Court of the State of Georgia on June 11, 1948, in the case of *Downing Musgrove* v. *Georgia Rail Road & Banking Company*, said judgment not having been handed down, published or otherwise made known until June 15, 1948:

> "This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the Court erred in overruling ground 3 of the general demurrer to the petition. Direction is given that the judgment overruling the demurrer on all grounds, whether general or special, be vacated, and that ground 3 of the general demurrer be sustained and the peti-

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tion be dismissed, without any ruling or judgment as to other grounds and without prejudice to either party or to the State with respect thereto. All the Justices concur except Wyatt, J., absent on account of illness, and Head, J., disqualified. Bill of Costs, $15."

The following is a copy of the order of the Supreme Court of the State of Georgia, passed July 16, 1948, overruling appellant's motion to rehear filed June 23, 1948, and its supplemental motion to rehear filed July 13, 1948:

"Upon consideration of the motion for a rehearing and the supplement thereto, filed in this case it is ordered that it be hereby denied. Head, J., disqualified."

The following is a copy of the order of the Supreme Court of the State of Georgia, passed July 28, 1948, overruling appellant's second motion to rehear filed July 21, 1948:

"Upon consideration of the second motion for a rehearing filed in this case, it is ordered that it be hereby denied. Head, J., disqualified."

Filed in office October 13, 1948, K. C. Bleckley, C. S. C. Ga.

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# Supreme Court of the United States

OCTOBER TERM, 1948

No. 413

GEORGIA RAIL ROAD & BANKING COMPANY, *Appellant,*

v.

DOWNING MUSGROVE, *Who is Revenue Commissioner of the State of Georgia, Appellee.*

**Appeal from the Supreme Court of the State of Georgia.**

## BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

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# Supreme Court of the United States

OCTOBER TERM, 1948

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No. ——

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GEORGIA RAIL ROAD & BANKING COMPANY, *Appellant*,

v.

DOWNING MUSGROVE, *Who is Revenue Commissioner of the State of Georgia, Appellee.*

---

**Appeal from the Supreme Court of the State of Georgia.**

---

## BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

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In connection with his statement asserting grounds making against the jurisdiction of this Court, filed under Rule 12, paragraph 3, the appellee has included a motion to dismiss or affirm. Such motion was served on appellant on October 25, 1948. Appellant, within twenty days after such service, files this brief, pursuant to Rule 7, paragraph 3, opposing the motion to dismiss or affirm.

## A.

## THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Georgia, pursuant to which that Court entered the final judgment which is the subject of this appeal, has not yet been officially reported. It is contained in the record but the record page cannot be given for the reason that this brief is being filed prior to the printing of the record. Such opinion may be found in 49 S. E. 2d (Adv.) 26.

## B.

## CONTENTIONS OF PARTIES ON PRINCIPAL ISSUE AS TO JURISDICTION.

### I.

**Appellee's position: State Court did not pass upon constitutional questions but merely held that appellant had chosen wrong remedy.**

Construing the motion to dismiss or affirm most favorably to appellee, its main contention is that this is simply a case in which the highest Court of a State has held that a litigant chose the wrong remedy for asserting rights claimed under the Constitution of the United States. Appellee contends that, since appellant chose, as appellee claims, a remedy not open to it for asserting its constitutional claims, appellant can not get such claims reviewed by this Court in this suit. Appellee contends that in order for appellant to obtain review by this Court of its constitutional claims it must assert them in a suit based on a remedy provided by the State for such purpose. Appellee contends that the State has provided several remedies any one of which would afford appellant opportunity of presenting its constitutional

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claims to the State Courts for determination, and to this Court for final determination, if such claims are ruled on adversely to appellant by the Supreme Court of Georgia. Though appellee does not say so, its contention is evidently based on the ruling of this Court in *Copperweld Steel Co.* v. *Industrial Commission of Ohio*, 324 U. S. 780.

## II.

**Appellant's position: State Court's erroneous holding that this suit against wrongdoer was suit against State deprived appellant of only remedy to assert its constitutional claims and State Court thus upheld validity of State laws claimed repugnant to United States Constitution.**

Appellant's contention on the other hand is, as shown by its jurisdictional statement, that there is not open to it any remedy which is plain, complete and beyond doubt except that upon which this suit is based, with the result that the Supreme Court of Georgia has, by the device of erroneously holding that this suit is a suit against the State as to which the State has not consented to be sued, upheld as valid the two Georgia laws which appellant claims are void as to it because violative of the Constitution of the United States. By the device of erroneously holding that this suit is a suit against the State as to which the State has not consented to be sued, when the fact is, as the complaint makes plain, that appellant has no other remedy which can meet the test of adequacy, the Supreme Court of Georgia has upheld as valid the two Georgia laws against appellant's claim of unconstitutionality just as effectively as if that Court had expressly and in terms upheld the offending Georgia laws. This appeal, therefore, comes squarely within the holding of this Court in *General Oil Co.* v. *Crain, Inspector of Coal Oil*, 209 U. S. 211.

## C.

## APPELLANT'S ARGUMENT ON PRINCIPAL ISSUE.

### I.

**This suit is not one against the State but is one against the Commissioner as a wrongdoer.**

That this suit is not a suit against the State but is a suit against the Commissioner personally as a wrongdoer cannot at this late date be doubted. See, in addition to the cases cited on this point in the jurisdictional statement, the following: *Ex parte La Prade,* 289 U. S. 444; *Gorham Mfg. Co.* v. *Wendell,* 261 U. S. 1; *Allen, Collector of Internal Revenue for the District of Georgia,* v. *Regents of University System of Georgia,* 304 U. S. 439; and *The Pullman Company* v. *Crum, Comptroller of the State of Florida,* 231 U. S. 571.

### II.

**Though denominated a declaratory judgment action, this suit in substance and effect is one in equity seeking full and primary equitable relief.**

The motion to dismiss or affirm erroneously assumes that the decision of the Supreme Court of Georgia turned upon the fact that this suit was self-styled (Paragraph 27 of the complaint) a suit authorized by the Georgia Declaratory Judgments Act of 1945 (Ga. L. 1945, pp. 137 et seq.). But the decision was predicated upon no such narrow ground and cannot be interpreted as holding that if this identical suit had been denominated one in equity a different result would have obtained. Looking at substance and disregarding slight differences in form, this suit is just as much a suit in equity to enjoin the Commissioner from enforcing against appellant laws claimed to be unconstitutional as to it as this suit would be if the complaint had not mentioned the Declaratory Judgments Act. If the complaint had not mentioned the Declaratory Judgments Act but had de-

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nominated the suit one in equity, it would have charged, as it now charges, that appellant was granted a charter by the Legislature of Georgia in 1833 containing a provision which limits the amount of ad valorem taxation which the State can enforce against it, that such charter constituted a contract between appellant and the State which can not be overridden by subsequent legislation or subsequently adopted provisions of the State Constitution, that the Commissioner was undertaking to collect ad valorem taxes from appellant to the same extent that he would have had a right to collect such taxes if appellant's charter contract had not contained the tax limitation provision by undertaking to enforce against appellant certain Georgia laws which do not exist as to it because they are violative of the contracts provision of the Federal Constitution, in view of appellant's charter contract, and the complaint would have sought, as the complaint now seeks, to enjoin the Commissioner from enforcing such unconstitutional laws.

The fact that the complaint, as a predicate for enjoining the Commissioner from enforcing the Georgia laws claimed by appellant to be unconstitutional as to it, prays the Court to "declare" that appellant's charter contract is inviolable, in the sense that it cannot be overridden by subsequently enacted legislation and by subsequently adopted provisions of the State Constitution, certainly does not prevent this suit from being in essence a suit in equity to enjoin the Commissioner as a wrongdoer. For, in order to grant appellant the primary relief which it seeks of enjoining the Commissioner from enforcing Georgia laws claimed unconstitutional as to appellant, the Court would necessarily have to "find" or "hold" or "declare" that the charter contract was inviolable in the sense that subsequent Georgia laws offensive to the Constitution of the United States could not override it, even though there were no prayer whatever in the complaint for a "declaration" to this effect. And had no mention been made of the Declaratory Judgments Act and had this suit been denominated a suit in

equity, the complaint would not in terms have asked the Court to "declare" what remedy appellant should pursue in the event of the Court's being of opinion that the relief sought could not be granted in the suit brought. Appellant simply would have alleged that it had no remedy at law which was plain, complete and beyond doubt, and, had the Court disagreed, it would have refused jurisdiction in equity on the ground that appellant had a remedy at law which the Court would have pointed out. The principle that equity will not take jurisdiction if there is an adequate remedy at law has been codified in Georgia, being Section 37-120, Georgia Code of 1933.

In a word, the complaint makes the same averments of fact, sets up the same constitutional claims, and seeks the same full and primary equitable relief which the complaint would have made, set up and sought, had the suit not mentioned the Declaratory Judgments Act, but had been expressly denominated a suit in equity. To consider this suit as being different in any essential respect from what it would be if the complaint had in terms labeled the suit as one in equity and had made no mention of the Declaratory Judgments Act, would be to give effect to form and to disregard substance and reality.

There is no basis, therefore, for any contention to the effect that this suit which is denominated a suit authorized by the Declaratory Judgments Act is a suit against the State as to which the State has not consented to be sued, but that a suit denominated one in equity making the same averments of fact, setting up the same constitutional claims and praying for the same full and primary relief, would not be a suit against the State but would be a suit against the Commissioner individually as a wrongdoer and would be maintainable. For, this suit sets up a cause in equity just as completely and effectively as though no Declaratory Judgments Act existed. And where no other remedy is available to test tax liability the policy of the Georgia law has always been to allow a taxpayer to resort to a suit in

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equity in the Superior Court (the Court in Georgia which has always exercised full equity jurisdiction) for such purpose. *Wright, comptroller-general, et al.* v. *The Southwestern Railroad Co.*, 64 Ga. 783; *Webb* v. *Newsom, sheriff*, 138 Ga. 342, 75 S. E. 106; *Gaulden* v. *Wright, comptroller-general*, 140 Ga. 800, 79 S. E. 1125; *Columbus Mutual Life Insurance Co.* v. *Gullatt, Tax Assessor, etc.*, 189 Ga. 747, 8 S. E. 2d 38.

## III.

**Since this suit exhausts equitable remedies and no other remedy exists, appellant is under compulsion to bring the present appeal to this Court on pain of a subsequent holding that failure now to appeal foreclosed appellant's constitutional claims.**

It is for the very reason that this suit is in essence and reality a suit in equity seeking full and primary equitable relief against the Commissioner individually as a wrongdoer that appellant is under compulsion to seek review and reversal by this Court of the judgment of the Supreme Court of Georgia in this suit.

As shown in the jurisdictional statement, if appellant were to suffer this suit to be dismissed pursuant to the judgment of the Supreme Court of Georgia without seeking review of that judgment by this Court upon appeal, and if appellant were then to bring a suit expressly denominated a suit in equity (without mentioning the Declaratory Judgments Act) against the Commissioner as a wrongdoer to enjoin him from enforcing against appellant the offending laws, after having pursued successively the statutory remedies which appellee says are open to appellant for obtaining judicial determination of its constitutional claims only to have each declared non-existent by the Supreme Court of Georgia, the Commissioner would be expected to resist such new suit with a plea setting up as res judicata the

judgment of the trial court dismissing this suit pursuant to the judgment of the Supreme Court of Georgia.

The theory of such a plea of res judicata would properly be that this suit, though denominated an action under the Declaratory Judgments Act, was in essence and reality a suit in equity and, therefore, identical with the new suit praying for essentially the same relief as that prayed for in this suit, and that, since this suit had been held to be a suit against the State as to which the State had not consented to be sued, the new suit, being identical in character with this suit and praying for essentially the same relief would be just as much a suit against the State as this was and would be barred and precluded by the judgment in this suit. And, should the Supreme Court of Georgia sustain such a plea, then upon appellant's appealing to this Court from the judgment of the Supreme Court of Georgia, the Commissioner would be expected to take the position, and doubtless might do so successfully, that under the doctrine of *Angel* v. *Bullington*, 330 U. S. 183, appellant, by failing to seek review and reversal by this Court upon appeal of the judgment of the Supreme Court of Georgia in this suit, in accordance with the right so to do given by *General Oil Co.* v. *Crain*, supra, had forever lost its right to get this Court to reverse the Supreme Court of Georgia for denying appellant its constitutional rights by the device of holding that a suit in equity against the Commissioner as a wrongdoer is a suit against the State as to which the State has not consented to be sued.

Obviously, this Court would have no concern with the erroneous holding of the Supreme Court of Georgia that this is a suit against the State except for appellant's contention that such erroneous holding had the effect of upholding the Georgia laws claimed by appellant to be void as to it for repugnancy to the Constitution of the United States. The decision of the Supreme Court of Georgia had the claimed effect because, as the complaint shows, appellant has pursued in this suit the only remedy open

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to it which is plain, clear and free from doubt, with the result that the Supreme Court of Georgia has deprived appellant of its only adequate remedy. But in view of this claim which appellant makes, this Court is concerned with the erroneous holding of the Supreme Court of Georgia that this is a suit against the State, and this Court should take jurisdiction of this appeal under *General Oil Co.* v. *Crain*, supra, if this Court is shown that appellant has no other remedy which can meet the test of adequacy, as charged in the complaint.

It remains, therefore, for appellant to demonstrate that it has no remedy which meets the test of adequacy—no remedy which is plain, complete and beyond doubt—except the remedy on which this suit is based.

## IV.

## Demonstration that appellant has no other remedy.

### 1.

**The three "ample remedies" suggested by appellee, all allegedly furnished by the Act of 1943, are either not open to appellant or do not exist.**

The motion to dismiss or affirm contends "that the laws of Georgia provide ample remedies for such defenses as appellant might have." Such motion, construing it again most favorably to appellee, states that there are three of these "ample remedies." Appellee contends that all are furnished by the Georgia Act of 1943, approved February 17, 1943, (Ga. L. 1943, pp. 204 et seq., which Act is printed as Appendix I hereto, and will be referred to hereinafter as "the Act of 1943") and are: (a) direct appeal to the Superior Court from the ruling of the Commissioner; (b) appeal from the Commissioner to a Board of Arbitration and from that Board to the Superior Court; and (c) affidavit of illegality.

a.

**Legislation to be reviewed.**

Appellant contends that neither the first nor the second of these remedies is open to it for asserting its constitutional claims, and that the third does not exist.

To demonstrate that this is true it will be necessary for appellant to review at this juncture three Georgia statutes:

(1) An Act approved January 3, 1938, (Ga. L. Ex. Sess. 1937-38, pp. 77 et seq.) the pertinent portions of which are printed as Appendix II hereto. Such Act will be referred to hereinafter as "the Reorganization Act of 1938";

(2) An Act approved March 27, 1941, (Ga. L. 1941, pp. 200 et seq.), which is printed as Appendix III hereto and referred to hereinafter as "the Act of 1941";

(3) The Act of 1943, above referred to.

b.

**The Reorganization Act of 1938 repealed all prior statutory remedies and substituted an exclusive remedy for contesting the Commissioner's rulings as to taxability.**

The Reorganization Act of 1938 created the office of Revenue Commissioner and gave to him, among other taxing powers, all taxing powers relative to railroads and other public utilities. Prior to that time all taxing powers relative to railroads and other public utilities had been exercised by the Comptroller-General. The Reorganization Act of 1938 created a Board of Tax Appeals (Section 18) and provided that such Board should review assessments made by the Revenue Commissioner (Section 19). By Section 45 of that Act, taxpayers were given the right to appeal decisions made by the Board of Tax Appeals to the superior courts. The Supreme Court of Georgia (the highest Court of the State) held that the Board of Tax Appeals had jurisdiction to determine taxability of property, it having done so at the commencement of its opinion

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in the case of *Forrester, Revenue Commissioner*, v. *Pullman Company*, 192 Ga. 221, 15 S. E. (2d) 185, as follows:

> "A State Board of Tax Appeals, consisting of the comptroller-general, the auditor, and the treasurer, ex officio, was created by section 18 of the act approved January 3, 1938. Georgia L. Ex. Sess. 1937-1938, pp. 77 et seq. Section 19 of that act declares in part that 'The function of the Board of Tax Appeals shall be to review the assessments made by the State revenue commissioner when by such assessment, after hearing by the commissioner or his regularly authorized employee or agent, any taxpayer may be aggrieved and petition for said review.' Code Ann., Cumulative Part, § 92-8421. An examination of other portions of the act of 1938, particularly those sections now codified as §§ 92-8434, 92-8445, and 92-8447, discloses that the commissioner himself has the power to determine the taxability of property; and since it is made the function of the Board of Tax Appeals to review the assessments made by the commissioner, this should be held to include not merely the amount of the tax assessment, but also whether or not the particular property was taxable. Nothing decided by this court in *Columbus Mutual Life Insurance Co.* v. *Gullatt*, 189 Ga. 747, (8 S. E. 2d, 38) *Allied Mortgage Companies, Inc.* v. *Gilbert*, 189 Ga. 756 (8 S. E. 2d, 45), or *Gilbert* v. *Associated Mortgage Companies*, 189 Ga. 768 (8 S. E. 2d, 46), militates against this view. On the contrary, it was said arguendo in the opinion in the first of these cases that the Board of Tax Appeals was 'created by the act to settle disputes as to valuation and taxability,' a statement which in our judgment is correct."

And, as pointed out by appellee's motion to dismiss or affirm, the Georgia Court of Appeals (whose decisions are final unless reversed by the Supreme Court of Georgia on certiorari, the latter Court having discretion always as to whether certiorari should be granted) held in *Forrester, Revenue Commissioner* v. *Pullman Company*, 66 Ga. App. 745, 19 S. E. 2d 330, a case involving taxability, that the

method of reviewing tax assessments of the Commissioner prescribed by the Reorganization Act of 1938 was exclusive. That Court said:

> "The method of reviewing the tax assessment of the Commissioner of Revenue is prescribed by our Code, §§ 92-8445, 92-8446, and the procedure therein is exclusive, and no trial court shall have jurisdiction of proceedings to question such assessments, except as in this chapter provided. Generally, under these sections, an aggrieved taxpayer may, within 30 days from the date of the final assessment and notice thereof, file with the Board of Tax Appeals, a petition for review. The finding of the Board of Tax Appeals shall not be final, but either party may appeal from any order, ruling, or finding of the board to the superior court of the taxpayer's residence, 'unless the taxpayer be a railroad or other public service corporation or nonresident, in which event the appeal of either party shall be to the superior court of the county in which is located its principal place of doing business, or in which the chief or highest corporate officer, resident in the State, maintains his office.''

Thus, under the above holding of the Georgia Court of Appeals which appellee cites as controlling law in his motion to dismiss or affirm, all of the statutory remedies which existed prior to the passage of the Reorganization Act of 1938 were repealed by that act.

The Reorganization Act of 1938 has been twice amended, but it is seen that prior to amendment it afforded a remedy which would have enabled appellant to get judicial determination of the taxability of its property had the Commissioner undertaken to tax appellant beyond what is permitted by its charter contract before the Reorganization Act of 1938 was amended.

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c.

**The Act of 1941 did not change as regards public utilities the exclusive remedy of the Act of 1938.**

The Reorganization Act of 1938 was first amended by the Act of 1941. By the Act of 1941 the Board of Tax Appeals was abolished as to all assessments made by the Revenue Commissioner except "assessments entered by the State Revenue Commissioner on tax returns for ad valorem taxes required to be made to the State Revenue Commissioner. The procedure provided for by said Act of January 3, 1938, with respect to said assessments shall remain of full force and effect as provided thereby." Railroads and other public utilities were required, as above stated, to make their returns for ad valorem taxation to the Revenue Commissioner. Hence, the Act of 1941 abolished the Board of Tax Appeals as to all assessments made by the Tax Commissioner except assessments for ad valorem taxation made by him against railroads and other public utilities. The Act of 1941 provided that assessments made by the Commissioner against taxpayers of any other class could be appealed directly from the Tax Commissioner to the appropriate superior court. It will be seen, therefore, that, if the Commissioner had undertaken to disregard appellant's charter contract at a time when the Reorganization Act of 1938 stood amended only by the Act of 1941, appellant would have had a right to contest the taxability of its property beyond what is permitted by its charter contract by appealing from the Commissioner's assessment to the Board of Tax Appeals and from that Board to the superior court. But before the Commissioner undertook to tax appellant beyond what its charter contract permits the Reorganization Act of 1938 was again amended, this time by the Act of 1943.

d.

**Summary of the provisions of the Act of 1943.**

This Act of 1943 did the following: (1) entirely abolished the Board of Tax Appeals; (2) provided that "all final rulings, orders and judgments of the State Revenue Commissioner," except those relating to ad valorem assessments made by the Commissioner against public utilities (the term "public utilities" as used here and hereinafter is meant to include railroads), could be reviewed by the superior courts on direct appeal from the Commissioner; (3) provided that public utilities should *not* have, with respect to ad valorem assessments made against them by the Commissioner, the foregoing remedy of appeal from the Commissioner to the superior courts; (4) gave public utilities, with respect to ad valorem assessments made against them by the Commissioner, the right to appeal from the Commissioner to a Board of Arbitrators and to appeal from the awards of that board to the superior courts when the only objection urged against the Commissioner's assessment was that he had assessed the property in excess of its "true value or amount"; (5) added the following proviso to the provision referred to in (2) above by which taxpayers other than public utilities were granted the right of direct appeal from the Commissioner to the superior courts: "Provided, however, that nothing herein contained and no provision of this act shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist the enforcement of same by affidavit of illegality."

e.

**The arbitration and appeal feature of the Act of 1943 relates to value and not to taxability and furnishes appellant no remedy in situation here involved.**

It is thus apparent that the Act of 1943 cut off from

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public utilities the remedy theretofore existing by virtue of the Reorganization Act of 1938 as it originally stood, and as it still stood after it was amended by the Act of 1941, namely, the remedy of having questions relating to taxability of property (as distinguished from questions relating solely to value) reviewed by the Board of Tax Appeals and then by the courts. The Act of 1943 gave to non-utility taxpayers the remedy of direct appeal to the superior courts from all assessments made against them by the Commissioner. That Act gave the same remedy to public utilities taxpayers as to all assessments made against them by the Commissioner, except assessments as to ad valorem taxability. As regards assessments as to ad valorem taxes made by the Commissioner against public utilities, the Act of 1943 gave that class of taxpayers the right to appeal to arbitrators and from their awards to the superior courts when and only when the question involved in a particular case relates to value. But the Act of 1943 makes no provision for public utilities to appeal from the Commissioner when the questions relate to taxability. There is plainly a hiatus in the Act of 1943 in that respect.

No sound argument can be made to the effect that the Act of 1943 intended that questions relating to ad valorem taxability of property of public utilities should be referred to the Board of Arbitration with the right of appeal from its award to the superior courts, because the plain words of the Act are that these taxpayers shall have the right "to refer the question of *true value or amount* to arbitrators as provided by Chapter 92-60 of the Code of Georgia of 1933." (Italics ours.) By referring to Section 92-6004, which is a part of Chapter 92-60, it will be seen that the oath to be taken by each arbitrator is that he "will diligently inquire as to the *value* of property and impartially decide the same, and will find and return the *true market value* thereof and of every part thereof according to the requirements of the law." (Italics ours.) Limiting the Board of Arbitration to the question of value and not giving

it the power to determine questions of taxability is in keeping with the policy of Georgia taxing statutes. *Columbus Mutual Life Insurance Co.* v. *Gullatt, Tax Assessor, etc.*, supra. That case held that a Georgia statute, using language less plainly that of limitation than the language used in the Act of 1943, had limited a Board of Arbitrators to questions of value. Since, therefore, the protection of appellant's claimed rights under the constitution of the United States involves taxability and not value, it is beyond question that the remedy of arbitration and appeal does not exist for the purpose of appellant's obtaining that protection.

f.

**Having destroyed appellant's exclusive remedy to test taxability provided by the Reorganization Act of 1938, the Act of 1943 provided a remedy of direct appeal to the Superior Court open to appellant as to other taxes but not as to ad-valorem taxability.**

It is equally plain that since appellant is a railroad and its question goes to ad valorem taxability and not value, the remedy of direct appeal from the Commissioner to the superior court does not exist as to appellant. This is true for the reason that the remedy of direct appeal, which is furnished by the Act of 1943 to non-utility taxpayers as regards *all* assessments made by the Commissioner against them, is furnished to public utility taxpayers *only as regards assessments made by the Commissioner against them for taxes other than ad valorem taxes.* For example, an assessment of State income taxes made by the Commissioner against a public utility is reviewable by direct appeal to the superior court.

g.

**Proviso of the Act of 1943 furnishes no remedy.**

It remains to be demonstrated that the third of the three

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"ample remedies" which the motion to dismiss or affirm contends are open to appellant for the protection of its constitutional claims does not exist. It will be recalled that this third remedy which appellee claims is open to appellant is the remedy by affidavit of illegality. Appellee contends that this remedy by affidavit of illegality is given by the proviso of the Act of 1943, which is, to quote it again: "Provided, however, that nothing herein contained and no provision of this act shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist the enforcement of same by affidavit of illegality."

The remedy by affidavit of illegality is purely statutory. *Manning* v. *Phillips et al.*, 65 Ga. 549; *City of Atlanta* v. *Jacobs*, supra, 125 Ga. 523, at page 528; 54 S. E. 534, at page 536. Therefore, if a remedy by affidavit of illegality exists by virtue of the above proviso, such proviso must be construed either (a) as having preserved remedies by affidavit of illegality which already existed at the time of the passage of the Act of 1943, or (b) as having revived the remedies by affidavit of illegality which existed prior to the Reorganization Act of 1938, or (c) as having itself created a remedy by affidavit of illegality which would not exist except for such proviso. The motion to dismiss or affirm contends that such proviso affords appellant a remedy by affidavit of illegality which would enable it to get judicial determination of its constitutional claims, but the motion to dismiss or affirm does not venture an opinion as to just what remedy by affidavit of illegality appellant is afforded to that end by such proviso. In asserting that the proviso gives appellant a remedy by affidavit of illegality the motion to dismiss or affirm does no more than quote the proviso without pointing out whether such remedy is one existent at the time of the passage of the Act of 1943 and preserved by the proviso, or one existent at the time of the passage

of the Reorganization Act of 1938 and repealed by that Act but brought back into existence by the proviso, or one which the proviso itself creates.

(i)

**The proviso did not preserve any existing remedy, for none existed to be preserved.**

Appellant contends that the proviso, however construed, has given it no remedy at all for the following reasons: *Forrester* v. *Pullman Company*, supra, held that the Reorganization Act of 1938 repealed all remedies of every nature existing prior to the passage of that Act and substituted a completely new remedy for testing judicially the assessments of the Commissioner. And no Act has been passed since the passage of the Reorganization Act of 1938 which mentions affidavits of illegality except the Act of 1943. Hence, at the time of the passage of the Act of 1943, no remedy by affidavit of illegality existed by which assessments made by the Commissioner could be tested, with the result that the proviso cannot be construed as having preserved any remedy by affidavit of illegality which existed at the time of the passage of the Act of 1943.

(ii)

**The proviso neither re-enacted any repealed remedy nor created a new remedy.**

Nor can such proviso be construed either as having re-enacted any remedy by affidavit of illegality which had existed prior to the passage of the Reorganization Act of 1938 but which was repealed by that Act, or as having itself created a new remedy by affidavit of illegality. For the language of the proviso is: "that nothing herein contained and no provision of this Act *shall be construed* to deprive a taxpayer * * * of the right to resist * * * by affidavit of illegality." (Italics ours.) And this language exhibits no legislative intent of re-creation (re-enactment) of previously existing remedies or creation of any new remedy.

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Even if the proviso contained language purporting to create a new remedy by affidavit of illegality, none would be created because of the proviso's failure to confer jurisdiction on some court to try the issues made by it. Since remedy by affidavit of illegality is always the product of legislation, conferrence of jurisdiction on some court to entertain such remedy is essential to its creation. Recognition of this essential was shown by the Legislature in creating the remedies by affidavit of illegality which were repealed by the Reorganization Act of 1938, all of them having conferred jurisdiction on some court and having fixed venue. (These remedies by affidavit of illegality which the Reorganization Act of 1938 repealed will be dealt with hereinafter.)

Again, if a taxpayer in appellant's situation were to assume that a new remedy by affidavit of illegality had been created by the proviso, such taxpayer, in an effort to pursue such remedy, would have to speculate not only as to the court intended to have jurisdiction but also as to the venue intended, whether the county of its principal place of business, or the county in which the tax execution was attempted to be levied on its property, or the county of the Capitol of the State where the Commissioner's office is located.

In order for the Legislature to have *revived* the remedies by affidavit of illegality which had been repealed by the Reorganization Act of 1938, it would have been necessary for it to use language far clearer than that employed in the proviso. Assuming that the Legislature had the power to revive these remedies by reference, certainly the proviso makes no *express* reference to them, or to any of them. Even when it is certain that a statute has referred to repealed statutes its intent to revive them must be clear and manifest. "* * * legislative acts should not receive a construction operative to revive repealed statutes by a mere reference thereto, where such effect does not clearly appear

to have been the intention of the Legislature." 50 Amer. Juris., § 578, p. 574.

(iii)

**Review of repealed remedies by affidavit of illegality.**

Prior to the year 1931, the remedies by affidavit of illegality by which appellant could have contested the taxability of its property had the Comptroller-General (in whom, as will be recalled, was vested the taxing powers relative to public utilities prior to the Reorganization Act of 1938) undertaken to assess ad valorem taxes for back years against appellant's property for the benefit of the State, counties and municipalities, were as follows:

1. If a railroad had filed its returns with the Comptroller-General when they were due it could have availed, so far as the taxability of its property for State taxation was concerned, of the remedy by affidavit of illegality furnished by Sec. 92-2604 of the Georgia Code, which section is printed as Appendix IV hereto. But the Supreme Court of Georgia in the case of *Goldsmith, Comptroller-General*, v. *The Georgia Railroad Co.*, 62 Ga. 485, held that this remedy could not be availed of if the railroad had not made its returns to the Comptroller-General, and in the case of *Wright, Comptroller-General*, v. *The Southwestern Railroad Co.*, supra, 64 Ga. 783, that Court held (near bottom of page 793) that, in order for a railroad to avail of this remedy, it must have filed its returns with the Comptroller-General when they were due, that they could not be filed after they were due;

2. As regarded county taxes a railroad could have availed of the remedy by affidavit of illegality furnished by Section 92-2706 which section is printed as a part of Appendix IV hereto;

3. As regarded municipal taxation, a railroad could have contested the taxability of its property by an affidavit of illegality of the same character as that which would have

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applied in the case of county taxes, Section 92-2804 having made such remedy available in the case of municipal taxes.

In the year 1931 a State Revenue Commission was created by the Legislature (Ga. L. 1931, pp. 7 et seq.), and this Revenue Commission (which was abolished by the Reorganization Act of 1938) was given certain powers as to taxation, but the Comptroller-General continued to have the same powers relative to assessing railroads for State, county and municipal ad valorem taxation. (See as to this editorial note following Section 92-4506, Code of Georgia, Annotated.) Section 92-7301, which was codified from the Act of 1931 by which such Revenue Commission was created, is as follows: "In the case of any tax due the State or any tax assessed by the State Revenue Commission, whether so specifically provided in the law levying the tax or not, the Commission is empowered to issue an execution bearing teste in the name of the chairman of the Commission and directed to all and singular the sheriffs of this State, commanding them to levy upon the goods and chattels, lands, and tenements of the taxpayer, which execution it shall be the duty of any sheriff to execute as in case of writs of execution from the superior courts. Whenever any such writ of execution has issued, the taxpayer, in order to determine whether the tax is legally due, may tender to the levying officer his affidavit of illegality thereto; and upon the payment of the tax if required as condition precedent by the law levying the tax, and upon his giving a good and solvent bond for the eventual condemnation money in cases where the said law does not require the payment of the tax as a condition precedent, the levying officer shall return the same to the superior court of the county of the taxpayer's residence, except in case the law provides otherwise, and the same shall be summarily heard and determined by the court. (Acts 1931, pp. 7, 33.)"

It is to be noted that the remedy by affidavit of illegality provided for by Section 92-7301 (just quoted) could be applied only as regarded "any tax due *the State* or any tax

assessed by the State Revenue Commission." Therefore, since, as above pointed out, the Revenue Commission was not given any power of ad valorem taxation over railroads, if Section 92-7301 gave to railroads a remedy of affidavit of illegality with respect to ad valorem taxation, that section gave that remedy to them only as to ad valorem taxes claimed to be due *the State*. That section at most made available to railroads its remedy by affidavit of illegality only as regarded ad valorem taxes assessed by the Comptroller-General in favor of *the State*. It did not make available to railroads its remedy by affidavit of illegality as regarded ad valorem taxes assessed by the Comptroller-General in favor of the counties and municipalities.

Thus it is seen that prior to the Reorganization Act of 1938, but subsequent to the 1931 Act, in the event of effort on the part of the Comptroller-General to collect ad valorem taxes for back years, a railroad could have contested the taxability of its property as regarded State taxes by affidavit of illegality furnished by Section 92-2604 if it had filed its returns with the Comptroller-General on time. If it had not filed its returns with the Comptroller-General on time it may be that it could have resisted taxability as regarded State taxes by virtue of the remedy by affidavit of illegality furnished by Section 92-7301 (codified from the 1931 Act). And as regarded ad valorem taxes assessed against it for back years for the benefit of counties and municipalities, a railroad could have contested taxability by the remedy of affidavit of illegality furnished by Section 92-2706, that section specifically providing for affidavit of illegality in the case of county taxes, and, as above stated, Section 92-2804 having made that remedy also available in the case of municipal taxes.

(iv)

**If proviso of Act of 1943 revived any repealed remedy, it revived one which furnishes appellant less than a complete remedy.**

Referring again to the proviso of the Act of 1943, it is

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appellant's contention, for the reasons heretofore set forth, that such proviso did not revive any of the remedies by affidavit of illegality which were open to appellant prior to the Reorganization Act of 1938. But if there is room for any argument at all on this point,—if there could be accepted the assumption that by the proviso the Legislature attempted to revive any repealed statute providing a remedy by affidavit of illegality and if further there could be accepted the assumption that such attempt was effective—the only remedy by affidavit of illegality which the Legislature could be said with any plausibility at all to have intended to revive was that furnished by the 1931 Act (Section 92-7301). That was the only remedy by affidavit of illegality by which tax liability sought to be imposed by the old Commission could be tested which was open to taxpayers other than public utilities when the Reorganization Act of 1938 was passed. That remedy by affidavit of illegality was available to taxpayers other than public utilities with respect to "any tax due the State or any tax assessed by" the old Commission. And the argument would be that the Legislature, by placing the proviso at the end of the provision by which the Act of 1943 provided that taxpayers other than public utilities should have the right of direct appeal to the Court from assessment by the new Commissioner (the one whose office was created by the Reorganization Act of 1938), intended to revive the remedy by affidavit of illegality furnished by the 1931 Act in order that taxpayers other than public utilities might have a remedy for contesting tax executions issued by the new Commissioner even if they had not availed of remedy by direct appeal to the Court from his assessments. But, as above pointed out, if the 1931 Act gave the remedy by affidavit of illegality to public utilities, it gave it only with respect to taxes claimed to be due the State, and did not give it with respect to taxes claimed to be due the counties and municipalities. It follows, therefore, that if the remedy by affidavit of illegality given by the 1931

Act ever applied to public utilities prior to its repeal by the Reorganization Act of 1938, and if the Legislature intended to revive it by the proviso of the Act of 1943, and if its intent so to do was effective and not abortive, appellant still does not have a remedy to contest the taxability of its property as regards the county and municipal taxation involved in this suit.

(v)

**The proviso did not amend an existing illegality statute not applicable to tax executions.**

Referring finally to the proviso of the Act of 1943, appellant calls attention to this: Chapter 39-10 of the Georgia Code of 1933 provides a remedy by affidavit of illegality by which executions issued pursuant to judgments may be contested. But that remedy has several times been held not available to test a tax execution. In *City of Atlanta* v. *Jacobs*, supra, the Supreme Court of Georgia said at page 528 of 125 Ga.: "The general statutes embodied in the Civil Code [of 1895], § 4736 et seq. [such sections being 39-1001 et seq. in the Code of 1933] providing for an illegality proceeding as a means for arresting an illegal levy are confined to executions based upon judgments rendered by the courts." Appellee could hardly contend that the Legislature by the proviso of the Act of 1943 intended to amend this remedy by affidavit of illegality so as to make it apply to tax executions issued by the Commissioner.

2.

***Statutory suit in equity was repealed by Reorganization Act of 1938.***

Prior to the Reorganization Act of 1938, there was open to appellant a remedy by a statutory suit in equity by which it could have contested the taxability of its property as to State, county and municipal taxes in a single suit brought against the Comptroller-General in the Superior Court of

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Fulton County. Such remedy was given by Section 92-6104, that section being as follows: "If the delinquent under section 92-6102 [Section 92-6102 empowered the Comptroller-General to demand the return of property as to which there was delinquency by giving twenty days' notice in writing] disputes the taxability of such property, he may raise the question by petition in equity in the superior court of Fulton County, and if such delinquent is dead, his personal representative or representatives shall have the same right. (Acts 1918, p. 234.)" Had the Act approved July 31, 1918 (Ga. L. 1918, p. 232), from which Act Section 92-6104 was codified, never been passed, appellant doubtless would have had the same right to contest the taxability of its property in a single suit in equity brought in the Superior Court of Fulton County by virtue of the last sentence of Section 92-6803. Section 92-6803, together with the two preceding sections, which must be read for an understanding of Section 92-6803, are printed as a part of Appendix IV hereto. But, accepting, as does appellee, the decision of the Georgia Court of Appeals in *Forrester* v. *Pullman Company*, supra, as controlling, remedy by *statutory* suit in equity was repealed by the Reorganization Act of 1938.

## V.

**Since appellant has no remedy except as sought in this suit, and since courts cannot legislate, the decision of the Supreme Court of Georgia upheld the validity of the offending laws and this Court has jurisdiction.**

If appellant had not proceeded by appeal to this Court, it would have found itself in the position of attempting to resist, by means of "remedies" which appellant does not believe exist, the effort of the Commissioner to tax its property under color of unconstitutional laws. Appellant cannot afford to, and should not be required to, speculate its property and its constitutional claims upon the remote pos-

sibility that, if appellant successively tried out each "remedy," the Supreme Court of Georgia, by a process of reasoning not now apparent to appellant, would hold that one of such "remedies" existed.

If, as appellant contends, and believes it has shown, appellant has no remedy other than the one on which this suit is based which meets the test of adequacy, then the effect of the decision of the Supreme Court of the State of Georgia has been to uphold the validity of the laws claimed unconstitutional as to appellant, and this Court has jurisdiction of the appeal under the doctrine of *General Oil Co.* v. *Crain*, supra.

## VI.

**This Court's decision in *Phyle v. Duffy* does not militate against appellant's position.**

The Attorney-General of Georgia is of counsel for appellee and it is possible that this court will consider the statement in the motion to dismiss or affirm that appellant has "ample remedies" for asserting its constitutional claims as constituting the opinion of the Attorney-General. In the absence of controlling statute or authority, this Court ordinarily gives great weight to the opinion of the Attorney-General of a State as to the existence of a State remedy. *Phyle* v. *Duffy*, decided by this Court June 7, 1948, 68 S. Ct. (Adv.) 1131. The present appeal, however, is not one for application of the *Phyle* case. This is true for the following reasons:

The portion of the motion to dismiss or affirm which appellant has hereinabove liberally construed as undertaking to point out that appellant has three "ample remedies" for testing its constitutional claims is as follows:

> "Under the Act of 1943, pp. 204, 206, it is specifically provided that 'all final rulings, orders and judg-

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ments of the State Revenue Commissioner shall be subject to appeal and review' in the Superior Court. We quote the following from the same act:

> "'Provided, however, that nothing herein contained and no provision of this law (Sections 92-8426 (d) to 92-8426 (f) shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality.'
>
> "Code Section 92-8426 (e) provides for plaintiff an adequate remedy at law—arbitration and appeal to the superior court."

Code references in the above quotation are all to Georgia Code Annotated, Cumulative Pocket Part, and upon examination it will be found that the sole source of such references is the Act of 1943. Hence, the conclusion of appellee that appellant has ample remedies is supported by neither argument nor judicial authority and amounts to no more than directing the attention of this court to the Act of 1943, which Act is itself a *controlling statute* as to appellant's having *no* remedy for disputing the ad valorem *taxability* of its property either (1) by direct appeal to the superior court from the Commissioner's ruling or (2) by the arbitration and appeal procedure set up for the purpose of resolving disputes as to value, as appellant has demonstrated. The plain words of the statute deny public utilities direct appeal from the Commissioner to the Court, and *Columbus Mutual Life Insurance Co.* v. *Gullatt,* supra, dealing with an analogous arbitration and appeal statute, is controlling authority against appellant's being furnished by the Act of 1943 the ability to test *taxability* by the arbitration and appeal procedure of the Act. And counsel for appellant submit that, in order for the proviso of the Act of 1943 to give a remedy by affidavit of illegality, the Appellate Courts of Georgia would have to legislate beyond filling in interstices.

## D.

## OTHER CONTENTIONS OF APPELLEE REFUTED.

One word more: The motion to dismiss or affirm, Paragraphs (B) and (D), asserts that the Supreme Court of Georgia, although it did not do so, could have reversed the trial judge for not having sustained appellee's general demurrer on grounds going to the merits. If appellee means to contend that this Court is without jurisdiction because of what is asserted in Paragraphs (B) and (D), the obvious answer is that if the Supreme Court of Georgia had based its decision upon the grounds urged in Paragraphs (B) and (D) of appellee's motion (but the State Supreme Court did not do so), this Court would plainly have jurisdiction, since, when there is a claim that a State statute impairs the obligation of a contract contrary to the Constitution of the United States, this Court is not bound by a State Court's decision as to whether there was a contract. Such was the holding of this Court in a case involving construction of the very contract which the Commissioner here seeks to impair. *Atlantic Coast Line R. Co.* v. *Phillips, State Revenue Commissioner*, 332 U. S. 168. And the contention made by appellee in Paragraph (C) of the motion, even if it were correct, would be fatal neither to this Court's jurisdiction nor to the suit on the merits.

We submit that the federal constitutional question raised is not only substantial but is entirely well taken; that this Court has jurisdiction; that the Motion to Dismiss or Affirm should be denied; and that the decision below should be reversed on the merits.

Respectfully submitted,

James E. Harper, Augusta, Ga.,
W. Inman Curry, Augusta, Ga.
Rembert Marshall, Atlanta, Ga.,
*Counsel for Appellant.*

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## APPENDIX I.

### The Act of 1943.

The Act of the General Assembly of Georgia, approved February 17, 1943, and published in Georgia Laws, 1943, pp. 204 et seq. is as follows:

An Act to amend an Act approved January 3, 1938, (Ga. Laws Ex. Session 1937-38, page 77), known as the Act creating the Department of Revenue, and providing for the administration of taxing laws, by fixing the salary of the State Revenue Commissioner; by abolishing the State Board of Tax Appeals; by providing for the discharge of the duties and functions of said Board; by providing for the assessment of property required to be returned for ad valorem taxation by certain corporations and companies to the State Revenue Commissioner; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. That the Act of the General Assembly approved January 3, 1938 (Ga. Laws Ex. [sic] Section 1937-38, p. 77) entitled "An Act to make comprehensive provision for an integrated tax administration for Georgia; to create the Department of Revenue and the office of State Revenue Commissioner; to confer upon such commissioner all the powers and duties formerly vested in the State Revenue Commission and in the Comptroller General in relation to petroleum inspection, licenses and taxation; to abolish the State Revenue Commission; to continue the Comptroller General as Insurance Commissioner, Comptroller of Withdrawals, to provide for the appointment, term of office, salary, oath, bond, authority, duties and removal of the State Revenue Commissioner; to provide for the organization and operation of the department; to create the State Board of Tax Appeals; to provide for review by the Board of the assessments and equalization orders of the Commis-

sioner; to make appropriation for the Department and the Board; to provide for appeal to the Board from the Superior Courts; to enforce tax liability to other states which reciprocate; to repeal Code Sections 92-4507-9, 92-6001-7, 92-7004-6, Chapters 92-60, and 92-68 and laws in conflict with this Act; to provide for the administration of and the enforcement of the tax laws; and for other purposes," be and the same is hereby amended by striking from Chapter 11, Section 2, thereof the words and figures "Forty-eight hundred dollars ($4800.00)" and inserting in lieu thereof the words and figures "Six thousand dollars ($6000.00)," so that said Section 2 of Chapter 11 shall read as follows:

"Section 2. Creation of Department and Office. Salary, bond, oath. The office of State Revenue Commissioner and the Department of Revenue are hereby created. The Commissioner is hereby made head of the Department of Revenue. The Commissioner shall be appointed by the Governor with the consent of the Senate for a term of four years, provided, however, the first term beginning at the time of appointment and running to February 1, 1947. The Commissioner shall receive a salary of six thousand dollars ($6,000.00) annually, payable monthly. Before entering upon the performance of his duties he shall execute and file an official surety General and amounting to seventy thousand dollars ($70,000), the premium on which shall be paid by the State. The Commissioner shall be required to take and subscribe before the Governor an oath to discharge faithfully and impartially the duties of his office, which oath shall be in addition to that required of all civil officers."

Section 2. That said Act of January 3, 1938, be, and the same is hereby further amended by striking and repealing all of Sections 18, 19, 20, 21, 22, 23 and 24 of Chapter III thereof, which said sections create a State Board of Tax Appeals, and provide for the review of decisions of the

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State Revenue Commissioner, and substituting in lieu thereof new sections to be numbered section 18, section 19, and section 20, which shall read as follows:

"Section 18. Except as otherwise provided by this Act, all matters, cases, claims and controversies, of whatsoever nature arising in the administration of the revenue laws, or in the exercise of the jurisdiction of the State Revenue Commissioner or the Department of Revenue, as conferred by this act, shall be for determination by the State Revenue Commissioner, subject to review by the courts as provided for by Section 45 of Chapter IV of this Act. The effect of this section shall be that, except as hereinafter provided, all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review under Section 45 of this act in the same manner, under the same procedure, and as fully, as if same had been considered and passed upon by the State Board of Tax Appeals. Any such appeal from a final ruling, order, or judgment of the State Revenue Commissioner shall be entered within the time prescribed by Section 45 of the Act: Provided, however, that nothing herein contained, and no provision of this Act, shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality.

All petitions for review filed and now pending before the Board of Tax appeals shall be and they are hereby declared to be in the same position as if the ruling, order, finding or assessment of the Commissioner therein complained of and sought to be reviewed had been affirmed by the Board of Tax Appeals; and all such rulings, orders, findings or assessments now pending for review before the Board of Tax Appeals shall be final and conclusive unless the taxpayer who filed said petition for review shall, within thirty (30) days from the date of the

passage of this Act, appeal said ruling, order, finding or assessment to the Superior Court in the manner provided by Code Section 92-8446, except that in the case of a foreign corporation domesticated in Georgia the appeal shall be made within the time herein prescribed to the Superior Court of the County in which such foreign corporation was domesticated in Georgia."

"Section 19. The provisions of the foregoing section with reference to reviewing assessments of the State Revenue Commission shall not apply to assessments for ad valorem taxation against any person, corporation or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property for ad valorem taxation to the Comptroller-General and is now required by such chapter and this Act of January 3, 1938, to make such returns to the State Revenue Commissioner. The State Revenue Commissioner shall carefully scrutinize such returns made to him, and if in his judgment the property embraced therein is returned below its value or the return is false in any particular, or in any wise contrary to law, he shall, within sixty days thereafter, correct the same and assess the value, from any information available. If any such person, corporation or company shall be dissatisfied with the assessment or correction of such returns as made by the State Revenue Commissioner or the Department of Revenue, such taxpayer shall have the privilege, within twenty days after notice of such assessment and correction, to refer the question of true value or amount to arbitrators as provided for by Chapter 92-60 of the Code of Georgia of 1933. Such arbitrators shall consist of one chosen by the taxpayer and one chosen by the Governor. If the arbitrators thus chosen shall be in disagreement, they shall choose an umpire. If such arbitrators disagree and shall fail to select an umpire within thirty days after receiving notice of their appointment, the Chief Justice of the Supreme

Court of Georgia shall select an umpire. Every arbitrator or umpire chosen hereunder shall be a citizen of Georgia. The award shall be made by the arbitrators or by the arbitrators and the umpire, as the case may be, within thirty days from the appointment or selection of such umpire. The decision and award of the arbitrators or of the arbitrators and the umpire shall be subject to appeal and review in the same manner as decisions and orders of the State Board of Tax Appeals were subject to appeal and review under the terms of Section 45 of this Act."

"Section 20. Sections 92-7004 to 92-7006 of the Code of Georgia of 1933, which relate to arbitration of State Revenue Commission's equalization of county assessments are hereby repealed. Chapter 92-60 (Section 92-6001 to 92-6007) of the Code of Georgia of 1933, as modified by the provisions of the foregoing Section 19, shall continue and remain in full force and effect as if fully set forth herein."

Section 3. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved February 17, 1943.

## APPENDIX II.

### The Reorganization Act of 1938.

The pertinent portions of the Act of the General Assembly of Georgia, approved January 3, 1938, and published in Georgia Laws, Extra Session, 1937-38, pp. 77 et seq., are as follows:

An Act to make comprehensive provision for an integrated tax administration for Georgia; to create the Department of Revenue and the office of State Revenue Commissioner; to confer upon such commissioner all the powers and duties formerly vested in the State Revenue Commission and in the Comptroller General in relation to petroleum inspection, licenses and taxation; to abolish the State Revenue Commission; to continue the Comptroller General as Insurance Commissioner, Comptroller of Withdrawals, to provide for the appointment, term of office, salary, oath, bond, authority, duties and removal of the State Revenue Commissioner; to provide for the organization and operation of the department; to create the State Board of Tax Appeals; to provide for review by the Board of the assessments and equalization orders of the Commissioner; to make appropriation for the Department and the Board; to provide for appeal to the Board from the Superior Courts; to enforce tax liability to other states which reciprocate; to repeal Code Sections 92-4507-9, 92-6001-7, 92-7004-6, Chapters 92-60, 92-61, and 92-68 and laws in conflict with this Act; to provide for the administration of and the enforcement of the tax laws; and for other purposes.

Chapter II. Department of Revenue, State Revenue Commissioner.

Section 2. Creation of Department and Office. Salary, bond, oath. The office of State Revenue Commissioner and

the Department of Revenue are hereby created. The Commissioner is hereby made head of the Department of Revenue. The Commissioner shall be appointed by the Governor with the consent of the Senate for a term of six years, * * *

Section 4. Powers and Duties, in General. The State Revenue Commissioner is hereby vested with all the power and authority and hereby required to perform all the duties formerly vested in the State Revenue Commission, and is hereby vested with all the power and authority and required to perform all the duties relating to matters of Petroleum Inspection, taxation, and licenses heretofore vested in the Comptroller General (except licenses to insurance companies and their agents) and he is also vested with all the power and authority and required to perform all the duties relating to taxation and licenses heretofore vested in any State administrative officer or State Department, but the powers and authorities by this section vested in the State Revenue Commissioner shall be the powers and authority of said Officers as modified, limited and enlarged by this Act.

Section 15. State Revenue Commission Abolished. The State Revenue Commission is hereby abolished, effective upon the approval of this Act.

Section 16. Certain Duties Retained by Comptroller General. Nothing contained in this Act shall be deemed to affect or impair the powers and duties of the Comptroller General with respect to controlling of withdrawals from the treasury, service as insurance Commissioner, or otherwise, in so far as the same do not concern taxation or licenses (other than licenses to insurance companies and their Agents).

Section 17. Repeal of Certain Code Sections. Sections 92-4507-92-4509, inclusive, of the Georgia Code of 1933, limiting the number of deputy commissioners to be appointed and their salaries, are hereby repealed.

## Chapter III—Board of Tax Appeals.

Section 18. Membership, Chairman, Term, Salary, and Oath. There is hereby created a State Board of Tax Appeals of three members, consisting of the Comptroller General, State Auditor and the State Treasurer, ex-officio. Each member shall serve without additional compensation. The Board shall elect a chairman. Before assuming their duties, each shall be required to take and subscribe before the governor an oath to discharge faithfully and impartially the duties of his office, which oath shall be in addition to the oath required of all civil officers.

Section 19. Review of Individual Assessments, Costs. The function of the Board of Tax Appeals shall be to review the assessments made by the State Revenue Commissioner when by such assessment, after hearing by the Commissioner or his regularly authorized employee or agent, any taxpayer may be aggrieved and petition for said review. The manner of securing and conducting the review shall be as hereinafter set out, but no request to review the Commissioner's assessment shall in any event be granted unless objection has first been filed with the State Revenue Commissioner.

Section 20. Review of Commissioner's Equalization. The Board of Tax Appeals is also hereby required, on petition of any chairman of a County Board of Assessors who is dissatisfied with the changes and corrections in the county assessment ordered to be made by the State Commissioner in equalizing its taxable valuation, to review the action of the said Commissioner if the said assessor within ten days from receipt of the notice of the Commissioner's action shall request it in writing. The review shall be in all respects identical with the review provided for an aggrieved taxpayer except that no assessment of costs shall be necessary, and except that the application for review must be filed within the time hereinabove specified and the hearing fixed shall be within twenty days thereafter. If the decision of the Board shall be made and notice thereof conveyed to the

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County Tax Assessor, it shall be the duty of the said assessor immediately to review and correct the county valuations in the manner required by law.

Section 21. Power to make Rules of Procedure. By general orders not inconsistent with this Act and the laws of the State the Board shall promulgate rules governing its proceedings. Subject to such orders, any person may appear and practice before the Board in his own case or in a case involving his immediate family, or for a corporation of which he is an officer or regular employee, or an estate of which he is a fiduciary; but no persons other than members of the bar shall appear and practice before the Board in behalf of others.

Section 22. Power to Employ Assistants, Incur Expenses. The Board is hereby authorized to employ a secretary and such other personnel as may be required, and to incur such other expenses, within the limits of its appropriation, as in its discretion may be necessary to give effect to the provisions of this Act.

Section 23. Appropriation. There is hereby set aside from the funds appropriated for tax administration an amount (to be specified by the Governor) sufficient to pay the necessary expenses for operating the Board of Tax Appeals for the fiscal years ending June 30, 1938 and June 30, 1939.

Section 24. Repeal of Certain Code Sections. The following provisions of Title 92 ("Public Revenue") of the Georgia Code of 1933 are hereby repealed. Sections 92-6001-92-6007, inclusive, relating to arbitration of assessments or correction of returns made by the Comptroller General, and 92-7004-92-7006, inclusive, relating to arbitration of State Revenue Commission's equalization of County assessments.

Chapter IV—Administrative Provisions.

Section 25. In General. The State Revenue Commis-

sioner is hereby charged with the administration and supervision of all tax laws of the State. * * *

Section 44. Appeal from Commissioner's Findings. The Commissioner's assessments shall not be reviewed except by the procedure hereinafter provided; no trial court shall have jurisdiction of proceedings to question such assessments except as in this Act provided. If any taxpayer shall be aggrieved by any assessment which the Commissioner may make, he may within thirty (30) days from the date when the assessment is finally made and notice thereof given to the taxpayer file with the Board of Tax Appeals a petition for review. The request for review may be accompanied by a copy of the taxpayer's return as filed with the Commissioner and of any special accounting or other report thereon which the Commissioner may have made or required to be made. Both the Commissioner and the taxpayer shall have the right to introduce before the Board of Tax Appeals any evidence or data which said Board may rule to be pertinent or relevant, whether it was introduced originally before the Commissioner or not. The filing of any such petition shall not abate penalties for nonpayment unless such appeal is finally decided in favor of the taxpayer, nor shall it stay the right of the Commissioner to collect the tax which is admitted to be due, by any methods available to him under the law, unless the taxpayer shall furnish security of a kind and in amount satisfactory to the Commissioner. Where the Commissioner is required by law to certify to any county or municipal government of this State all or any part of an assessment or tax against any taxpayer, and the taxpayer disputes the correctness of said assessment or tax as determined by the Commissioner, the Commissioner is hereby directed to certify to said county and municipal government the value of the property of the taxpayer and/or the tax admitted by him in his return to be due, and after a final determination of the balance of said assessment or tax in dispute shall make a supple-

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mental certification to said counties and municipal governments of the amount of the balance of said assessment or tax as may be finally determined. It shall be the duty of the taxpayer to pay, as required by law, any taxes that may be assessed by the State, county or municipal governments, both upon the original value as shown in his return as well as upon its supplemental value that may finally be determined as in this Act provided.

Section 45. Review of Board's decisions. Jurisdiction of the Superior Courts. The findings by the Board of Tax Appeals shall not be final; but either party may appeal from any order, ruling, or finding of the said Board to the Superior Court of the county of the residence of the taxpayer unless the taxpayer be a railroad or other public service corporation or non-resident, in which event the appeal of either party shall be to the Superior Court of the County in which is located its principal place of doing business, or in which the chief or highest corporate officer, resident in the State, maintains his office. The appeal and necessary records shall be certified and transmitted by the Chairman of the Board and shall be filed with the Clerk of the Superior Court within thirty (30) days from the date of judgment by the Board. The procedure provided by law for applying for and granting appeal from the Court of Ordinary to the Superior Court shall apply as far as suitable to the appeal authorized herein, except that the appeal authorized herein may be filed within fifteen (15) days from the date of judgment by the Board.

Before the Superior Court shall have jurisdiction to entertain such appeal filed by any aggrieved taxpayer, such taxpayer shall file with the Clerk of the Superior Court a writing whereby such taxpayer shall agree to pay on the date or dates the same shall become due all taxes for which such taxpayer has admitted liability and shall within thirty (30) days from the date of judgment by the Board file with the Clerk of the Superior Court, except where appellant

owns real property in Georgia, the value of which is in excess of the amount of the tax in dispute, a bond in amount satisfactory to such Clerk or other security in amount satisfactory to such Clerk conditioned to pay any tax over and above that which the taxpayer has admitted liability for which shall be found to be due by a final judgment of court, together with interest and costs. It shall be ground for dismissal of the appeal if the taxpayer fails to pay all taxes admittedly owed upon the due date or dates as now or hereafter provided by law.

If the final judgment of court places upon the taxpayer any tax liability which he has not already paid, he shall pay the same on the due date or dates now or hereafter fixed by law if the tax or any of same has not become due on the date of said final judgment of court. And if the tax or any of same has already become due at the time of final judgment of court, the taxpayer shall immediately pay the tax or so much thereof as has already become due, with interest, and shall pay the court costs, in the event the final judgment of court is adverse to the taxpayer, no matter whether the tax or any part of same has or has not become due at the time of said final judgment of court.

Section 51. Be it further enacted that all laws and parts of laws in conflict herewith be and the same are hereby repealed.

Approved January 3, 1938.

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## APPENDIX III

## The Act of 1941.

The Act of the General Assembly of Georgia, approved March 27, 1941, and published in Georgia Laws, 1941, pp. 200 et seq. is as follows:

An Act to restrict and limit the jurisdiction of the State Board of Tax Appeals created and provided for by Chapter 3 of the act approved January 3rd, 1938, reorganizing the administration of the revenue laws of Georgia; to provide the disposition of cases, matters and controversies now pending before the State Board of Tax Appeals; and for other purposes.

Be it and it is hereby enacted by the General Assembly of Georgia:

Section 1. From and after the approval of this act the jurisdiction of the State Board of Tax Appeals created and provided for by Chapter 3 of the act approved January 3rd, 1938, entitled,

"An act to make comprehensive provision for an integrated tax administration for Georgia; to create the Department of Revenue and the office of State Revenue Commissioner; to confer upon such commissioner all the powers and duties formerly vested in the State Revenue Commission and in the Comptroller General in relation to petroleum inspection, licenses and taxation; to abolish the State Revenue Commission; to continue the Comptroller General as Insurance Commissioner, Comptroller of Withdrawals, to provide for the appointment, term of office, salary, oath, bond, authority, duties and removal of the State Revenue Commissioner; to provide for the organization and operation of the department; to create the State Board of Tax Appeals; to provide for review by the Board of the assessments and equalization orders of the Commissioner; to make appropriation for the Department and the Board; to

provide for appeal to the Board from the Superior Courts; to enforce tax liability to other states which reciprocate; to repeal Code Sections 92-4507-9, 92-6001-7, 92-7004-6, Chapters 92-60, 92-61 and 92-68 and laws in conflict with this Act; to provide for the administration of and the enforcement of the tax laws; and for other purposes," shall be limited to reviewing in the way and manner provided for by said act of January 3rd, 1938, assessments entered by the State Revenue Commissioner on tax returns for ad valorem taxes required to be made to the State Revenue Commissioner. The procedure provided for by said act of January 3rd, 1938, with respect to such assessments shall remain of full force and effect as now provided thereby.

Section 2. All cases, matters, claims and controversies of whatsoever nature except those relating to the assessments of which jurisdiction in the State Board of Tax Appeals is retained by this act shall, upon the approval of this act, be recommitted to the State Revenue Commissioner who shall thereupon proceed to pass upon and determine any questions therein presented or involved. Any such ruling by the State Revenue Commissioner shall be subject to review by the courts as now provided for by said act of January 3rd, 1938, as fully as if such rulings had been reviewed by the State Board of Tax Appeals.

Section 3. The time during which any such matter, case or controversy as prior to the approval of this act pended before the State Board of Tax Appeals shall be excluded from computation in determining whether any appeal from such assessment or ruling made thereon is barred by the statute of limitations prescribed by any revenue law.

Section 4. All laws or parts of laws in conflict with this act are hereby repealed.

Approved March 27, 1941.

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## APPENDIX IV.

Sections 92-2604, 92-2706, 92-6801, 92-6802, and 92-6803, of the Code of Georgia of 1933 (the official legislative code of Georgia) are as follows:

92-2604. (1034) Illegality to resist tax; venue.—If any railroad company affected by the preceding sections desires to resist the collection of the tax therein provided for, said company through its proper officer may, after making the return required in section 92-2602, and after paying the tax levied on such corporation and continuing to pay the same while the question of its liability herein is undetermined, resist the collection of the tax above provided for, by filing an affidavit of illegality to the execution or other process issued by the Comptroller General, stating fully and distinctly the grounds of resistance, which shall be returnable to the superior court of Fulton county, to be there determined as other illegalities; the same to have precedence of all cases in said court as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality, in which case the Comptroller General shall be represented by the Attorney General of the State. If the grounds of such illegality are not sustained, the Comptroller General shall, after crediting the process aforesaid with the amount paid, proceed to collect the residue due under the provisions aforesaid; and if, at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, said illegality shall be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax execution issued by the Comptroller General. (Acts 1874, p. 107; 1931, pp. 7, 38.)

92-2706. (1041) Affidavit of illegality to resist tax.—If any railroad company desires to dispute its liability to such county tax, it may do so by an affidavit of illegality, to be made by the president of said railroad or other officer thereof having knowledge of the facts in the same manner as other affidavits of illegality are made, and shall be returned for trial to the superior court of the county where such tax is claimed to be owing and where it is sought to be collected, where such cases shall be given precedence for trial over all other cases, except tax cases in which the State shall be a party. (Acts 1889, p. 29; 1916, p. 34; 1927, p. 136.)

92-6801. Taxes, how assessed and collected.—In all cases where taxes are authorized for any purpose and no adequate provision is made in the law authorizing the same or in the general law for giving the taxpayer notice and opportunity to be heard as to the valuation and taxability of his property, the method of assessing and collecting said taxes shall be as set forth in this Chapter. (Acts 1910, p. 22.)

92-6802. Assessment by the Comptroller General. Arbitration.—Where the property subject to said tax is such as is returnable to the Comptroller General he shall assess the same at the valuation fixed in the annual returns, if said returns are satisfactory to him; if not, he shall within 60 days after receiving said returns make an assessment of the property from the best information he can procure, and notify in writing the officer or person making such returns, who shall have the privilege within 20 days after receiving such notice, to refer the question of true value to arbitrators, one to be chosen by himself, and one to be chosen by the Comptroller General, with power in the two so chosen to choose an umpire in case of disagreement; and their award shall be final. (Acts 1910, pp. 22, 23.)

92-6803. School tax.—In all such cases where the taxes are authorized for school purposes in the counties

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or school districts, the taxpayer's annual returns to the Comptroller General shall set forth all his taxable property in said county or school district, as the case may be, subject to said taxation, and the Comptroller General shall assess the said property for school purposes at the same time and in the same manner as he is authorized by law to assess the same for ordinary county purposes, applying the school-tax rate fixed by the school authorities in said counties or districts, which said school-tax rate or rates shall be certified and transmitted to the Comptroller General by the county authorities at the same time they certify to him the county tax rate for ordinary county purposes in cases of railroad property, and the further procedure, on the part of the Comptroller General for collecting said school tax shall be the same as that providing for the collection of county taxes due by railroads as provided for in sections 92-2701 to 92-2706, both inclusive, in so far as the same can be applied. Where it becomes necessary for the Comptroller General to issue a tax fi. fa. for county purposes, as well as for school purposes, he may include said school tax therein, specifying in the assessment and tax execution the amount of the county taxes for ordinary purposes and the amount for school purposes, separately, so that the tax collector, after collecting the same, shall pay over each tax to the proper person authorized by law to receive the same. Should the taxpayer desire to contest the taxability of his property, as provided under this and the preceding section, he may do so by petition in equity in the superior court of Fulton county. (Acts 1910, pp. 22, 23.)

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 413

---

GEORGIA RAIL ROAD AND BANKING COMPANY,
*Appellant,*

*vs.*

DOWNING MUSGROVE, WHO IS STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

---

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

---

EUGENE COOK,
*Attorney General of Georgia;*
CLAUDE SHAW,
*Deputy Assistant Attorney General of Georgia;*
VICTOR DAVIDSON,
*Special Assistant Attorney, Counsel for Appellee.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 413

---

GEORGIA RAIL ROAD AND BANKING COMPANY,
*Appellant,*

*vs.*

DOWNING MUSGROVE, WHO IS STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA,
*Appellee*

---

## APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

---

The Appellee, Downing Musgrove, State Revenue Commissioner of the State of Georgia, believing that the matter set forth below will demonstrate the lack of substance in the questions raised by this appeal, files this, his statement, in opposition of Appellant's statement as to the jurisdiction. Appellee includes herein his motion to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of Georgia on the ground that the questions raised on behalf of Appellant are so unsubstantial as not to need further argument.

Appellee asserts that the unsubstantial character of the grounds stated by Appellant is so apparent on the face of the record as to warrant the court in summarily disposing of the case at this stage of the proceedings.

The matters here relied on by Appellee are more particularly stated below.

Appellant bases its appeal on an erroneous assumption that the Supreme Court of the United States will assume jurisdiction on a decision of a State Court construing a State Statute providing for certain actions which may be filed in State Courts. The petition of Appellant against Appellee was based on a new statute, that of 1945 authorizing the granting of declaratory judgments in certain cases. The decision of the Supreme Court of Georgia ordered the petition dismissed on the grounds that declaratory judgment was not Appellant's remedy and held that the petition was an action against the State of Georgia and that the State of Georgia had not given its consent to be sued in such actions.

The appeal should, therefore, be dismissed because it is a well-settled rule of decisions that the United States Supreme Court will not take jurisdiction over such State Court decisions.

Although it is not stated in the opinion written by the Supreme Court of Georgia in the case, yet, it is clearly evident that the court had several grounds which would have required a dismissal of Appellant's petition.

(A) In Appellant's petition it claims that it might not have any other remedy at law other than this method in which to resist the payment of the taxes described in the petition. However, it is clearly evident that the laws of Georgia provided ample remedies for such defenses as Appellant might have.

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Under the Act of 1943, pp. 204, 206, it is specifically provided that "all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review" in the Superior Court. We quote the following from the same Act:

> "Provided, however, that nothing herein contained and no provision of this law (Sections 92-8426 (d) to 92-8426 (f) shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality."

Code Section 92-8426 (e) provides for plaintiff an adequate remedy at law—arbitration and appeal to the Superior Court.

Code Section 92-8445 specifically forbids injunction in such cases as follows:

> "Appeal from Commissioner's findings; petition; supersedeas; evidence; decision.—The Commissioner's assessments shall not be reviewed except by the procedure hereinafter provided. No trial court shall have jurisdiction of proceedings to question such assessments, except as in this Chapter provided."

The foregoing was construed in *Forrester, Revenue Commissioner* v. *Pullman Company,* 66 Ga. App. 745.

> "The method of reviewing the tax assessment of the Commissioner of Revenue is prescribed by our Code, 92-8446, and the procedure therein is exclusive, and no trial court shall have jurisdiction of proceedings to question such assessments, except as in this chapter provided."

Clearly, Appellant has ample remedy at law and under numerous decisions of the Supreme Court of Georgia declaratory judgment cannot be invoked whenever there are other remedies available. See *Mayor and Council of Athens* v. *Gerdine*, 42 S.E. (2d) 567, decided May 19, 1947, and citations therein. These decisions would have required a dismissal of the petition regardless of whether the Act had provided for declaratory judgments against the State.

(B) Appellant, in its petition, bases its right of action on an alleged contract which it claims to have entered into with the State of Georgia by the Act of the Legislature of 1833, in which the State granted perpetual tax exemption. Although it alleges that the State is bound by this contract, yet, nowhere in its petition does it allege that the railroad company has complied with its part of the contract and built the railroads specified and required by the original Act of 1833. The Supreme Court of Georgia would have been authorized to take judicial cognizance of the fact that this railroad has not complied with its contract and has not built all the railroads required by its charter. The demurrers raised the question of Appellant's failure to allege compliance with its contract and the Supreme Court of Georgia would have been authorized to dismiss the petition on this ground.

(C) Appellant, in its petition, pleaded *res judicata* in the decisions of *Wright* v. *Georgia Railroad and Banking Company*, 216 U. S. 420 and also in the case of *State* v. *Georgia Railroad and Banking Company*, 54 Ga.423. It will be noted, however, that the case in the 216 U. S. held that judgment for taxes for one year is not *res judicata* as to taxes for other years, basing its decision on the case of *Georgia Railroad and Banking Company* v. *Wright, Comptroller Gen-*

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*eral*, 124 Ga. 596. These two decisions are in harmony with the decision of the United States Supreme Court handed down in April of 1948, holding that judgment for taxes for one year is not *res judicata* as to other years.

Appellant's petition calls attention to the Constitution of Georgia of 1945 which revokes such tax exemption as set forth in the petition.

(D) Appellant's petition asks for an injunction against *ad valorem* taxation of the property of Appellant, claiming it to be exempt from all taxation by virtue of the following provision of its charter:

> "The stock of said company and its branches shall be exempt from taxation for and during this term of seven years from and after the completion of the said railroads or any one of them: and after that, shall be subject to a tax not exceeding one half per cent per annum on the net proceeds of their investments."

It will be noted from the foregoing that the statute provided a stock exemption and not an *ad valorem* property tax exemption on the tangible assets of the corporation. While previous court decisions have construed stock tax exemption to be synonymous with property tax exemption, yet, such is not always the construction given it by the courts. In some instances it has been claimed that income tax is an indirect tax on the property itself. However, that is not the prevailing line of decisions of today. The same would hold good as to whether a stock tax exemption would be the same as a property tax exemption.

WHEREFORE, Appellee respectfully submits this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need

further argument or further consideration of this Court and Appellee respectfully moves the court to dismiss this appeal, or in the alternative to affirm the judgment of the Supreme Court of Georgia.

This 21st day of October, 1948.

EUGENE COOK,
*Attorney General;*
CLAUDE SHAW,
*Deputy Asst. Attorney General;*
VICTOR DAVIDSON,
*Special Asst. Attorney General for this Case;*
*Attorneys for Downing Musgrove, State Revenue Commissioner.*

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# Supreme Court of the United States

OCTOBER TERM, 1948

No. 413

GEORGIA RAIL ROAD & BANKING COMPANY, *Appellant*,

v.

DOWNING MUSGROVE, *Who is State Revenue Commissioner of the State of Georgia, Appellee.*

**Appeal from the Supreme Court of the State of Georgia to the Supreme Court of the United States**

## MOTION TO SUBSTITUTE CHARLES D. REDWINE FOR DOWNING MUSGROVE AS APPELLEE.

JAMES E. HARPER, Augusta, Ga.,
W. INMAN CURRY, Augusta, Ga.,
REMBERT MARSHALL, Atlanta, Ga.,
*Counsel for Appellant.*

Foote & Davies, Inc., Atlanta, Ga.

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# Supreme Court of the United States

OCTOBER TERM, 1948

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No. 413

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GEORGIA RAIL ROAD & BANKING COMPANY, *Appellant,*

v.

DOWNING MUSGROVE, *Who is State Revenue Commissioner of the State of Georgia, Appellee.*

---

**Appeal from the Supreme Court of the State of Georgia to the Supreme Court of the United States**

---

## MOTION TO SUBSTITUTE CHARLES D. REDWINE FOR DOWNING MUSGROVE AS APPELLEE.

---

Now comes *Georgia Rail Road & Banking Company,* appellant in the above case, (and which will be referred to hereinafter as appellant), and moves this Court to substitute as appellee in this case Charles D. Redwine, who is now State Revenue Commissioner of the State of Georgia, for Downing Musgrove, who was State Revenue Commissioner of the State of Georgia when this case was decided by the Supreme Court of the State of Georgia, when the appeal of

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this case was allowed on October 13, 1948, from said State Supreme Court to this Court, and when this case was docketed in this Court on November 13, 1948.

This motion is based upon the following showing:

1. Said Downing Musgrove resigned as State Revenue Commissioner of the State of Georgia on November 15, 1948, and said Charles D. Redwine is now the duly appointed, qualified and acting State Revenue Commissioner of the State of Georgia, his appointment to that office by the Governor of Georgia, his acceptance of the appointment, his qualification as State Revenue Commissioner of the State of Georgia, and his entering upon the duties of that office having all taken place on November 17, 1948.

2. Appellant has called upon said Charles D. Redwine to state whether or not, unless enjoined, he will adopt or continue the action of his predecessors in seeking to enforce against appellant (a) the Act of the General Assembly of Georgia, approved February 28, 1874, and found in Georgia Laws 1874, pages 107 et seq., and (b) Article I, Section III, Paragraph III of the Constitution of Georgia of 1945, (which laws are charged by appellant in this suit to be in violation of the contracts clause, Article I, Section 10, Paragraph 1, of the Constitution of the United States, for the reason that they seek to nullify the tax limitation contained in Section 15 of appellant's legislative charter of 1833), by attempting to collect from appellant the ad valorem taxes to prevent the collection of which this suit seeks injunction, and thus pursue the effort to collect said taxes which M. E. Thompson, the original defendant in this suit initiated when he was State Revenue Commissioner of the State of Georgia and would have carried out had this suit not been brought and had he not been restrained by the restraining order issued in this suit, and which effort Glenn S. Phillips would have carried out except for this suit and said restraining order, (said Phillips having succeeded said Thompson as State Revenue Commissioner of the State of Georgia and having been substituted for him as a party to this suit),

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and which effort said Musgrove would have carried out except for this suit and said restraining order, (said Musgrove having succeeded said Phillips as State Revenue Commissioner of the State of Geo.gia and having been substituted for him as a party to this suit).

3. Said Charles D. Redwine has informed appellant that, upon advice of the Attorney General of the State of Georgia, he refuses to state whether or not, unless enjoined, he will adopt or continue the said action of his said predecessors and proceed to collect said taxes.

4. Appellant charges that such refusal is itself tantamount to a threat by said Charles D. Redwine to adopt or continue the said action of his said predecessors,—action designed to enforce laws which appellant avers to be in violation of the Constitution of the United States.

5. Appellant charges that said Charles D. Redwine (notwithstanding said refusal on said advice to state his position) has in fact determined to adopt or continue the said action of his said predecessors and to proceed to collect said taxes, and appellant further charges that said Charles D. Redwine, unless enjoined, will so proceed.

6. Said Charles D. Redwine has likewise refused, on advice of said Attorney General, to assent to being substituted for said Downing Musgrove as appellee in this case.

7. This Court can look to State law for power to substitute as appellee said Charles D. Redwine for said Downing Musgrove. *Ex parte La Prade*, 289 U. S. 444; *Gorham Mfg. Co.* v. *Wendell, State Comptroller of New York et al.*, 261 U. S. 1.

The applicable Georgia statute is the Act of the General Assembly of Georgia, approved March 20, 1941, and published in Georgia Laws 1941, pages 516 et seq., a copy of said Act being attached hereto as Appendix I. See *Cox* v. *Linder, Commissioner*, 191 Ga. 790, at page 792; 14 S. E. 2d 93, at page 94, a suit seeking an injunction against a State officer as a wrongdoer to prevent his enforcing an

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allegedly unconstitutional law, in which the Supreme Court of the State of Georgia (the highest court of the State), on the basis of said Georgia substitution statute, substituted a successor officer as defendant in error, the original defendant in error having gone out of office while the case was pending in said State Supreme Court. (The record in said State Supreme Court in Cox v. Linder, Commissioner, supra, shows that the motion for substitution, made on behalf of the successor officer by the then Attorney General and an Assistant Attorney General, and predicated upon said Georgia substitution statute, was consented to by counsel for plaintiff in error, but the fact of consent is of no consequence. Consent cannot furnish power to effect a substitution of parties. *Shaffer* v. *Howard, Auditor of The State of Oklahoma et al.*, 249 U. S. 200, 201; *The Pullman Company* v. *Croom, Comptroller of the State of Florida*, 231 U. S. 571. The State Supreme Court's power to make the substitution was derived from the substitution statute and this was recognized by the State Supreme Court by its not having mentioned the consent and by its showing in its statement of the case that the successor had been made a party in accordance with the substitution statute.) It is plain, therefore, that under State law this Court has power, upon the showing made by appellant in this motion, to substitute as appellee in this case said Charles D. Redwine for said Downing Musgrove.

8. Moreover, even if power to make said substitution were not furnished by State law, said substitution can be made pursuant to this Court's Rule 19, Paragraph 4 (which is now supported by this Court's broad rule making power (see Reviser's Notes to Section 2071 of new Title 28, United States Code), in view of repeal of Section 11 of the Act of February 13, 1925, by the Act of June 25, 1948; see new Title 28, United States Code, Congressional Service, issued July 1948, Schedule of Laws Repealed, at page 1661). As to substituting a successor wrongdoer, see *Allen, Collector*

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*of Internal Revenue for the District of Georgia*, v. *Regents of University System of Georgia*, 304 U. S. 439.

9. Service of this motion has been made upon said Charles D. Redwine and upon counsel of record for appellee, including the Attorney General of the State of Georgia.

WHEREFORE, having shown that there is a substantial need for continuing and maintaining this case and obtaining an adjudication of the questions involved, appellant prays:

(a) That this Court order said Charles D. Redwine to show cause by response to this motion within such reasonable time as this Court may fix why he should not be substituted as appellee in this case for said Downing Musgrove;

(b) That this Court order that said Charles D. Redwine in his response to this motion formally state to this Court whether or not, unless enjoined, he intends to proceed to the end of collecting said taxes to prevent the collection of which this suit seeks injunction;

(c) That this Court order that said Charles D. Redwine be substituted for said Downing Musgrove as appellee in this case, unless said Charles D. Redwine, in his response to this motion, disavows any intent to proceed to the end of collecting said taxes;

(d) That if, in his response to this motion said Charles D. Redwine does disavow any intent to proceed to the end of collecting said taxes, or if for any other reason this Court concludes that said substitution cannot be made, this Court, in pursuance of its policy to give such direction as justice may require to cases which for any reason have become moot, (*Shaffer* v. *Howard, Auditor of The State of Oklahoma et al.*, supra, 249 U. S. 200, 201; *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28, 36; *Walling, Administrator of Wage and Hour Division, U. S. Department of Labor*, v. *James V. Reuther, Inc.*, 321 U. S. 671, 676, 677; *Brownlow et al.*, v. *Schwartz*, 261 U. S. 216, 218, 219; *Duke Power Co. et al.* v. *Greenwood County, S. C. et al.*, 299 U. S. 259, 267; see particularly new Title 28, United States Code, Section 2106)

reverse the judgment of said State Supreme Court erroneously holding that this is a suit against the State, and remand said suit to said State Supreme Court with direction that it order the Superior Court of Fulton County, Georgia, to dismiss said suit as moot,—so that said judgment of said State Supreme Court, erroneously holding that this is a suit against the State, may not bar appellant from resisting any future effort on the part of said Charles D. Redwine, or any successor in office to him, to collect said taxes under color of said laws which appellant contends are unconstitutional as to it. (Appellant's statement as to jurisdiction and brief in opposition to motion to dismiss or affirm make plain that appellant's *only* remedy for contesting taxability is a suit in equity against the Commissioner as a wrongdoer, and that, if the judgment of said State Supreme Court remains outstanding, any future suit to prevent the collection of said taxes brought against said Charles D. Redwine, or any successor in office to him, as a wrongdoer would be held by said State Supreme Court likewise to be a suit against the State and not maintainable since such a suit would be in all essential respects identical with this suit.)

(e) That should this Court for any reason decline to allow the substitution and to deal with this case on the merits, it in terms provide that appellant's constitutional objections are saved. See *Republic Natural Gas Co.* v. *The State of Oklahoma et al.*, U. S. , 68 S. Ct. (Adv.) 972, at bottom of page 978.

JAMES E. HARPER
W. INMAN CURRY
REMBERT MARSHALL
*Counsel for Georgia Rail Road & Banking Company, Appellant.*

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## APPENDIX I.

### Survival of Suits By or Against Public Officers.

### No. 287.

An Act To provide for the survival of suits commenced by or against public officers in their official capacity in favor of or against their successors in office in the event of death, removal, resignation or expiration of the term of such officers; to provide the procedure in such case; to provide that the provisions of this Act shall apply to pending litigation; to restrict the application of this Act; and for other purposes.

Be it enacted by the General Assembly of Georgia and it is hereby enacted by authority of same:

Section. 1. That when any suit shall have been commenced by or against a public officer of this State in his official capacity and relating to the present and continuing duties of such office, the same shall in the event of the death, resignation, removal or expiration of the term of such officer while the suit is pending in the trial court and courts of review, survive in favor of or against his successors in office.

Section 2. In such event the successor in office shall be made a party upon motion either in term time or vacation in whatever court the case shall be pending at the time, of which he shall be given reasonable notice. When the successor shall have been made a party in accordance with this Act, the case shall thereupon proceed as if no change of parties had been made, provided that it shall be within the discretion of the court to allow the successor in office such time as he may deem necessary to appear, plead or otherwise proceed with such case.

Section 3. The provision of this Act shall apply to suits pending on the date of its approval, including all such actions that have not been formally dismissed even though the death, removal, resignation or expiration of the term

of such public officer may have occurred prior to the date of the approval of this Act.

Section 4. The provisions of this Act shall not apply to actions against officers for damages on account of tortious acts committed by such officer colore officii, which survives against such officer or his personal representatives, notwithstanding the death, resignation, removal or expiration of the term of such officer.

Section 5. The provisions of this Act shall relate only to suits commenced by or against State officers in their official capacity and shall not relate or apply to suits commenced by or against municipal, district, or county officers.

Section 6. All laws and parts of laws in conflict with this Act be and the same are hereby repealed.

Approved March 27,* 1941.

(Copied from Georgia Laws 1941, pp. 516 et seq.)

*The original Act in the Georgia Secretary of State's office shows March 20 as date of approval.

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JANUARY 3, 1949.

*Per Curiam Decision.*

No. 413. GEORGIA RAIL ROAD & BANKING CO. *v.* MUSGROVE, STATE REVENUE COMMISSIONER. Appeal from the Supreme Court of Georgia. *Per Curiam:* Redwine substituted for Musgrove as appellee. The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. MR. JUSTICE JACKSON is of the opinion that probable jurisdiction should be noted. *James E. Harper, W. Inman Curry* and *Rembert Marshall* for appellant. *Eugene Cook*, Attorney General of Georgia, *Claude Shaw*, Deputy Assistant Attorney General, and *Victor Davidson* for appellee. Reported below: 204 Ga. 139, 49 S. E. 2d 26.

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